BUREAU OF AUTOMOTIVE REPAIR

FINAL STATEMENT OF REASONS

HEARING DATES: June 10, 2011 and June 13, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS: STAR Program

SECTIONS AFFECTED: The following sections of Article 5.5 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations:

§§ 3340.1, 3340.16, 3340.16.5, and 3340.41

The following sections of Article 10 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations:

§§ 3392.1, 3392.2, 3392.2.1, 3392.3, 3392.3.1, 3392.4, 3392.5, 3392.5.1, 3392.6, and 3392.6.1

Updated Information:

The Initial Statement of Reasons is included in this file. The Bureau of Automotive Repair issued a 15-day notice of availability of modified text that included changes to the STAR Program regulation text on June 23, 2011. This notice was sent to the bureau's interested parties' mailing list only. As a result, on July 1, 2011 the bureau opened a separate 15-day notice of availability of modified text for individuals that attended the South El Monte and/or Sacramento regulatory hearing. These separate comment periods were necessary in order to provide all interested parties' ample time to review and comment on the modifications made to the regulation text.

Further, on July 20, 2011 the bureau issued a second 15-day notice of availability of modified text that included changes to the STAR Program regulation text. This notice was sent to all interest parties on the bureau's mailing list and individuals that attended the South El Monte and/or Sacramento regulatory hearing.

The following changes were made during the first 15-day notice of availability of modified text:

1. Amend Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend the definition of Excessive Test Deviation Rate (ETDR) in section 3340.1 (1 - 4) by removing "on vehicles for which it should be performed

exceeds the statewide average for similar vehicles" and add "exceeds the statewide average for similar vehicles where 90% of similar vehicles received the test".

Modifying the definition of ETDR is necessary in order to better describe how the standard is determined by BAR.

2. Amend section 3340.1 of Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Remove the old definition of FPR and replace it with one that provides additional clarity.

    This change is necessary in order to meet the clarity standard as required by Government Code section 11349(c).

3. Amend section 3340.1 of Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend the definition of Similar Vehicle Failure Rate by adding "vehicles at".

    This change is necessary in order to meet the clarity standard as required by Government Code section 11349(c).

4. Amend section 3340.1 of Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend the definition of similar vehicles by adding "Vehicle Lookup Table".

    The abbreviation VLT lacked clarity; as the term would not be know by those affected by the regulation.

5. Amend section 3340.16 of Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Remove "owns a test-and-repair station that" and replace it with "owns a station that provides repair services, which".

    BAR modified the conflict of interest language to include any licensed station that provides repair services. This change serves the purpose of making the proposed action timeless. In essence, license classification titles may change, due to this variable BAR felt it necessary to describe the service that makes up the conflict rather than the station type.

6. Amend section 3392.3.1 of Article 10, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend the title of the section to "Eligibility/Performance Standards for STAR Certification."
    This change provides additional clarification to the public regarding what information is contained in this section of the proposed regulation.

    b. Amend subsection (a) by adding "/ performance standard".

    This change provides additional clarification to the public regarding what information is contained in this subsection of the proposed regulation.

    c. Amend paragraph (5) of subsection (a) by removing "The station cannot have received any citations pursuant to Section 44050 of the Health and Safety Code within the preceding one-year period from the effective date of the citation nor employ any licensed Smog Check technician who has received any citations pursuant to Section 44050 of the Health and Safety Code within the preceding one-year period from the effective date of the citation."

    Add to paragraph (5) of subsection (a) "A station cannot have received a citation, nor can employ any licensed Smog Check technician who has received a citation, within the preceding one year period from the effective date of the citation for violations of sections 44012, 44015, 44015.5, 44016, 44032, and 44060 of the Health and Safety Code and sections 3340.15, 3340.16, 3340.16.5, 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Title 16, California Code of Regulations."

    This modification improves clarity by specifying the violation of what code sections would affect STAR eligibility.

    d. Amend paragraph (6) subsection (a) by removing ", or any other disciplinary order" in multiple place and other non-substantive changes.

    This change was made because "any other disciplinary order" is overly broad. This amendment improves clarity of the regulation.

    e. Remove paragraph (8) subsection (a) from regulation.

    This paragraph was overly board and did not provide affected persons adequate information on what conduct would be cause for discipline.

    This change renumbers (a)(9) to (a)(8), (a)(10) to (a)(9), (a)(11) to (a)(10), (a)(12) to (a)(11), (a)(13) to (a)(12), and (a)(14) to (a)(13).

7. Amend section 3392.4 of Article 10, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:
    a. Amend subsection (b) by removing “9” and “13” and adding “8” and “13”.

       These conforming changes are necessary due to the modifications to section 3392.3.1 (a).

8. Amend section 3392.5.1 of Article 10, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend paragraph (1) of subsection (a) by deleting “, engage in any conduct which violates any provision of this article or which would be cause for discipline of, or which would be cause for issuance of a citation to the station's Automotive Repair Dealer registration or Smog Check station license, or the license of a technician employed by the station” and add “is issued an order of suspension, probationary order, or a citation for violations of sections 44012, 44015, 44015.5, 44016, 44032, and 44060 of the Health and Safety Code and sections 3340.15, 3340.16, 3340.16.5, 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Title 16, California Code of Regulations.”

       This modification addresses concerns raised during the public comment period and seeks to clarify which statutes and regulations will be used in determining STAR eligibility.

    b. Amend paragraph (3) of subsection (a) by removing “The STAR station's Automotive Repair Dealer registration, Smog Check station license, or the license of any technician employed by the station, is disciplined by the bureau in any form or manner.” And add “The station owner, manager, licensed Smog Check technicians, or any other employee of the station, may not have been convicted of a crime within the preceding three-year period that is substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician. The station owner, manager, licensed Smog Check technicians, or any other employees of the station, may not have been found liable in a civil proceeding, excluding small claims matters, for acts or omissions that are substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician. The station owner, manager, licensed Smog Check technicians, or any other employees of the station may not be serving a probationary period as a result of a criminal or civil proceeding substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician.”

This modification addresses concerns raised during the public comment period that the proposed language was overly broad. As a result, BAR has updated the text and provide more specificity in regards to which actions will be used to determine STAR eligibility.

The following changes were made during the second 15-day notice of availability of modified text:

1. Amend section 3340.1 of Article 5.5, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Modify the definition of similar vehicles by deleting "similar", "model", ", transmission type or body type" and add "at a minimum", "the same", and "and". Additionally, BAR made minor grammatical changes to this section.

    This change is necessary in order to meet the clarity standard as required by Government Code section 11349(c).

2. Amend section 3392.3.1 of Article 10, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    a. Amend paragraph (5) of subsection (a) by removing ", and 44060" and "sections" and add "which is final and non-appealable" in multiple places, "any of the following", "(a) and (b)" in multiple places, "and", "(a)", and "Division 33". Additionally, BAR made minor punctuation, grammatical and editorial changes to this section.

    BAR determined it was necessary to modify this section to provide more specificity regarding when a citation will become effective and when it can be used by BAR in determining STAR eligibility.

3. Amend section 3392.5.1 of Article 10, Chapter 1, Division 33, Title 16, California Code of Regulations, to read as follows:

    b. Amend paragraph (1) of subsection (a) by removing "is issued", ", and 44060" and "sections" and add "receives", "which is final and non-appealable" in multiple places, "any of the following", "(a) and (b)" in multiple places, "and", "(a)", and "Division 33". Additionally, BAR made minor punctuation, grammatical and editorial changes to this section.

    BAR determined it was necessary to modify this section to provide more specificity regarding when a citation will become effective and when it can be used by BAR in determining STAR eligibility.

Local Mandate:

A mandate is not imposed on local agencies or school districts.

Business Impact:

Smog Check Station Impact

AB 2289 and these proposed regulations will prevent lower-performing Test-Only and Test-and-Repair stations from issuing Smog Check certificates to likely high-emitting and gross-polluting vehicles. By eliminating all repair-based standards the proposed regulations will allow some higher-performing Test-and-Repair stations that have been unable to meet existing Gold Shield performance criteria to participate in the STAR program.

BAR will begin implementing the inspection-based performance criteria in phases. Upon adoption of these regulations, BAR plans to provide stations and technicians a preliminary report of their performance. This will provide Smog Check stations and technicians time to assess and modify, if necessary, their behavior prior to the STAR program becoming operational on January 1, 2013. The STAR program is voluntary, and not all stations are expected or will even want to participate. Low-performing stations that do not improve their behavior will find that they will not be able to inspect likely high-emitting and gross-polluting vehicles, because these vehicles will be required to receive an inspection at STAR stations. By controlling which stations are eligible to test likely high-emitting and gross-polluting vehicles a financial incentive is created for stations to modify their behavior. This behavior shift will result in higher quality Smog Check inspections and additional emissions-related repairs for likely high-emitting and gross-polluting vehicles.

The business impact of these proposed regulations may be felt by the industry in a number of different ways and lead to an increased Smog Check failure rate. The 2009 Sierra Research, Inc. report estimates that the Roadside inspection failure rate is, on average, approximately 1.5 times higher than the industry Smog Check failure rate, which suggests that the industry failure rate should be higher than it is today. Improving station performance requirements for stations inspecting likely high-emitting vehicles, additional high-emitting vehicles will appropriately fail their Smog Check inspection. This will increase the number of inspections performed by the industry because more vehicles will need to be re-inspected after initially failing. In turn, this will increase the number of high-emitting vehicles receiving emissions-related repairs.

Since STAR certification does not mandate participation, stations may choose, as a business decision, to meet the certification criteria to test likely high-emitting and gross-polluting vehicles. Stations not meeting the eligibility criteria can continue performing change of ownership inspections, inspections on vehicles being initially registered in California and inspections of vehicles not subject to H&S 44010.5 or 44014.7, or vehicles not identified by BAR as gross polluters.

Under the current certification program Test-Only and Test-and-Repair stations that participate in the new STAR program will see an increased number of Smog Check re-tests and repairs. Test-Only stations may realize a drop in initial and re-test inspections and income associated with performing such tests if they do not participate in the STAR program.

Test-and-Repair stations that do not participate in STAR will likely realize increased repair volume due to the anticipated increase to the inspection failure rate. The number of consumers that will seek repairs at STAR stations versus non-STAR stations is indeterminate. While this proposal may affect the number of stations licensed under each type of license, the total number of licensed stations and technicians is not expected to change.

STAR stations will be required to post a STAR program sign similar to the current Gold Shield sign. BAR has informally contacted a variety of sign manufacturers and determined the average cost is approximately $60 per STAR certified station.

Consumer Impact

Consumers will benefit from greater emissions reductions due to a higher level of state oversight associated with STAR certified stations.

BAR currently offers the Consumer Assistance Program (CAP) Vehicle Retirement (VR) option, which provides consumers an economic incentive to retire their high-emitting vehicle. Consumers meeting income eligibility requirements can receive up to $1,500 for the retirement of their vehicle. In addition, BAR operates the Repair Assistance (RA) option which offers consumers whose vehicles fail a Smog Check inspection and meet certain eligibility requirements up to $500 for emissions-related repairs.

Vehicles failing a Smog Check inspection at lower-performing stations tend to use temporary fixes, such as replacing a catalytic converter, while ignoring other vehicle emission component problems that caused the vehicle's catalytic converter to fail in the first place. In this example, the catalytic converter would most likely need to be replaced again upon its next Smog Check inspection. In contrast, high-performing stations typically perform a proper diagnosis, followed by the appropriate repair that targets the root problem for the vehicle failing a Smog Check inspection. Proactive repair work can result in significant long-term savings to consumers.

The 2009 Sierra Research, Inc. report estimates that the Roadside inspection failure rate is, on average, approximately 1.5 times higher than the Smog Check failure rate, which suggests that the Smog Check failure rate should be higher. This means that the development of performance standards for vehicles subject to H&S 44010.5 and 44014.7 means that more consumers will likely fail their Smog Check inspection, and need to properly repair their vehicles. However, consumers will benefit in a number of different

ways from these proposed regulations. As more vehicles with emissions-related problems receive appropriate repairs, consumers will likely benefit from improved vehicle reliability, a reduction in future repair bills, improved vehicle fuel economy, a reduction in greenhouse gas emissions, and improved air quality.

Consideration of Alternatives:

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

Alternative 1: BAR considered using the existing Gold Shield certification program; however, AB 2289 required BAR to develop inspection-based performance standards as a way of achieving additional reductions of motor vehicle emissions.

Availability and Location of the Rulemaking File and the Final Statement of Reasons:

All the information upon which the proposed regulations are based is contained in the rulemaking file that is available for public inspection by contacting the persons named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the Web site listed below.

Objections or Recommendations/Responses:

I. 45-Day Comment Period

1. *The following comment was received from William L. Gausewitz, on behalf of California Emissions Testing Industries Association (CETIA)*

    a. "The Regulations Will Harm Test Only Stations. Test-Only stations were created by the Legislature with restrictions upon their allowable activities. Those businesses which elected to operate under these restrictions did so because by doing so they were privileged to provide market services that they could not otherwise provide. Those businesses established as Test-Only stations did so voluntarily with the recognition that they would be of a select station category that could test the state's dirtiest vehicles. Referred to as 'high emitter profile' vehicles, it is these vehicles that are directed to Test-Only stations. These directed vehicles

are the only reason a Test-Only station has an economic basis to exist because, law precludes them from conducting any vehicle repair.

Without having these vehicles directed to a Test-Only station that station would be forced to close. STAR certification for existing stations that have already committed to a business model and facility leases is not optional. If BAR adopts regulations which have the effect of prohibiting existing Test-Only stations from obtaining STAR certification, it will effectively put these stations out of business. Test-Only stations are not permitted under their license to perform repairs and therefore would have no ability to recoup losses resulting from STAR certification denial."

This comment/recommendation was rejected because:

The proposed regulation does not eliminate any business opportunity for stations that perform proper inspections in compliance with the Smog Check Program laws and regulations. The Test-Only station license classification is not being eliminated. It should be noted that licensed stations can change their station classification freely and without disruption to their business operations. Some stations may choose to change their classification from Test-Only to Test-and-Repair to increase their business diversity, thus providing them the option of performing emissions-related repairs. This choice exists even if the station does not meet the criteria to qualify for, the proposed STAR Program.

Data also show that directed vehicles only account for a portion of the vehicles inspected at Test-Only stations. During calendar year 2010, 71% of the Test-Only stations received 56% of their test volume from non-directed vehicles (consumers who voluntarily take their vehicles to a Test-Only station for inspection).

Pursuant to AB (Assembly Bill) 2289 (Eng, Chapter 258, Statutes of 2010), the proposed regulation continues the direction of likely high-emitting vehicles to both Test-Only and Test-and-Repair stations. However, both station types will be required to meet the same inspection-based performance standards. Participation in the STAR Program by licensed stations continues to be voluntary. Both Test-Only and Test-and-Repair stations will continue to realize inspection revenue from non-directed vehicles whether they choose not to, or are not qualified to, participate in the STAR Program.

Failure to implement inspection-based performance standards that can be applied consistently to both Test-Only and Test-and-Repair stations will likely impact the success of the Smog Check Program.

AB 2289 clearly mandates that directed vehicles be inspected by select stations meeting inspection-based performance standards. One of the goals of AB 2289 was to respond to the findings of the Sierra Research, Inc. report "Evaluation of the California Smog Check Program Using Random Roadside Data" dated March 12, 2009 which showed that the existing network of stations are performing improper inspections, resulting in a loss of emissions reductions benefits.

The report findings were based on analysis of 1976 to 1995 model-year vehicles. Currently, essentially all vehicles due for a biennial inspection in this model-year group are directed to Test-Only and Test-and-Repair stations that have qualified as Gold Shield stations. Smog Check Program data for calendar year 2010 shows that the majority (92%) of the directed vehicles seek initial Smog Check inspections from Test-Only stations. At this time, only Test-and-Repair stations are required to meet performance standards for Gold Shield certification. AB 2289 now requires both Test-Only and Test-and-Repair stations to meet the same inspection-based performance standards in response to the findings of the Sierra Research, Inc. report.

The direction of vehicles to Test-Only stations was initially sought by the state in 1993-94 as a compromise with the industry even though the United States Environmental Protection Agency (USEPA) regulations, in response to the Federal Clean Air Act of 1990, required states to develop a centralized, state-operated inspection and maintenance program. California successfully negotiated compromise legislation based on the March 31, 1995 Radian Corporation report, "Evaluation of the California Pilot Inspection/Maintenance (I/M) Program," which suggested that California's direction of its dirtiest vehicles to a network of licensed Test-Only stations in lieu of USEPA's proposed centralized program could achieve the necessary emission reductions.

However, the Sierra Research, Inc. report findings showed that the negotiated compromise is not achieving the necessary emissions reductions benefits of directing vehicles to stations without some sort of controls via a contract, or in the alternative, a set of performance standards for a licensed network of stations. The report went on to suggest that inspections performed by higher

performing stations could result in greater emissions reductions. AB 2289 coupled the concept of inspection-based performance standards with the directed vehicle program to create an incentive for stations to voluntarily improve the quality of their inspections.

Stations that perform inspections in compliance with Smog Check Program laws and regulations will be able to qualify and participate in the proposed STAR Program. The pursuit of this regulatory action at this time will allow stations time to meet the qualification criteria necessary to participate in the STAR Program. Upon adoption of this package, performance measures will be published and updated based on a calendar quarter schedule (January, April, July, and October). Stations and technicians that want to participate in the STAR Program will be able to assess their performance and make improvements where needed in order to achieve the level of performance necessary to participate in the STAR Program. For example, stations employing technicians that fail to perform the low-pressure fuel evaporative test when required can institute training and procedures necessary to ensure technicians properly perform all portions of the inspection. Alternatively, stations can pursue hiring technicians that routinely perform the low-pressure fuel evaporative test as required by law. Stations will have multiple opportunities to meet the inspection-based performance standards before the program commences January 1, 2013.

The proposed regulation does not impact the ability of an existing station, which meets the inspection-based performance standards, to continue testing likely high-emitting vehicles.

CETIA represents the Test-Only industry and has expressed concern that the proposed regulations will "put" the Test-Only industry out of business. However, there is the possibility that the entire privately-operated Smog Check inspection industry could be in serious jeopardy if the proposed STAR Program regulation and all of its components are not adopted. Without these regulations, it is uncertain, under the current structure, whether BAR can continue to direct likely high-polluting vehicles when the performance by one station cannot be readily or easily distinguished from the performance of another station. If inspection performance does not improve BAR may allow all stations to inspect directed vehicles.

Another possible outcome, given the emissions reductions shortfalls identified in the Sierra Research, Inc. report is, if the STAR Program fails to be implemented, the state may be federally mandated to take steps necessary to

achieve control and enforcement over the performance of the Smog Check Program, which could include the development of a network of testing facilities operated under state contract with a private vendor, with or without the current licensed network.

b. "The Regulations Will Not Reduce Pollution. Therefore, CETIA believes that certification should only be denied for Test-Only Stations already in the market on verifiable objective criteria demonstrating that an illegal test was performed and that the impact of the error created sufficient emissions reductions losses. To de-certify a Test-Only STAR station for a lesser infraction would be excessively punitive and a de-facto confiscation of that business.

CETIA supported AB 2289 and worked throughout the legislative process for substantive changes to ensure the competitiveness of Test-Only Stations in the market. The reluctance of the industry to fully support the legislation had to do with maintaining market fairness and stability. Test-Only stations were created by the Legislature and have, in good faith, made substantial business investments in equipment and facilities, and have established business models within the criteria of legislation. The intent of AB 2289 was to improve the level of emissions reductions without destabilizing the existing market and avoiding undo business and job losses.

The intent of this legislation was explained in the Assembly Floor Analysis when the bill was considered for concurrence in Senate amendments. The analysis said:

> ***The author's office contends that this bill is designed to improve smog check in reducing pollution through the use of new technologies (OBD II) that provide considerable time and cost savings to consumers while at the same time improving consumer protections by adopting more stringent fine structures to respond to station and technicians that perform improper and incomplete inspections (emphasis added)."***

This comment/recommendation was rejected because:

This proposed regulatory action will not lead to the confiscation of any business or license associated with any business. CETIA is proposing that STAR Certified stations face invalidation strictly for substantiated violations of the current laws and regulations. However, this process already exists for all stations subject to the Smog Check Program, thus the inspection-based performance standard language in AB 2289 would not have been necessary had that been the bill's sole intent.

One of the major considerations in developing AB 2289 was the Sierra Research, Inc. report dated March 12, 2009, specifically the suggested use of performance standards. The August 25, 2010 Assembly Floor Analysis supports this assertion:

> *"To better address the extent to which improper and/or falsified test results may be factors in the smog check program, the report [Sierra Research, Inc.] recommended corrective steps, some of which [inspection-based performance standards] are incorporated in this bill."*

In addition, the August 23, 2010 Senate Rules Committee analysis more directly addressed the establishment of inspection-based performance standards as follows:

> *"This bill [AB 2289] makes several changes to the smog check program, but the two most significant policy changes include requiring that vehicles be inspected using the vehicle's OBD II system and establishing performance standards that test-only and Gold Shield stations must meet in order to be eligible to issue certificates of compliance or noncompliance to high-emitting vehicles directed to them."*

As a result, AB 2289 incorporated the inspection-based performance standards as a condition of certifying vehicles directed for testing. CETIA's interpretation of performance standards is not representative of AB 2289 objectives.

Based on the findings of the Sierra Research, Inc. report, which was the impetus behind AB 2289, many of the existing stations are not performing inspections in compliance with established laws and regulations. The performance of proper inspections is the cornerstone of an effective Smog Check Program; only vehicles that fail the initial inspection receive repairs that result in emissions reductions benefits.

The report estimated a loss of emission benefits due to improper inspections to be as high as 70 tons per day. This is a significant finding given that the Air Resources Board (ARB) estimates that the Smog Check Program will achieve 400 tons per day of emissions reductions benefits if all inspections are properly performed. Based on the report findings, the emissions reductions attributable to the Smog Check Program are not being fully achieved.

An important note is that the loss of emissions benefits lies primarily with the stations that test likely high-emitting vehicles, specifically Test-Only stations as they inspect approximately 92% of vehicles directed for testing. As detailed in the Sierra Research, Inc. report, 79% of the Smog Check stations involved in this analysis (1,493 out of 1,886) were Test-Only stations. Because repairs are not performed at Test-Only stations, and because the high

roadside failure rate for vehicles that failed the initial inspection in the previous Smog Check cycle shows up immediately after the re-test and does not appear to be related to owner tampering, Test-Only stations with a low rank[1] sometimes appear to be inappropriately passing vehicles that should have failed. This suggests that the vehicles were either improperly or fraudulently passed at Test-Only stations

The Sierra Research, Inc. report points out the shortcomings of the current program in which likely high-emitting vehicles are directed to stations based on their license classification, such as Test-Only, rather than based on their ability to consistently perform proper and legitimate inspections.

Furthermore, since many of the existing Test-Only stations are directly responsible for the program shortcomings, it would be counter-productive to continue to allow them to test likely high-emitting vehicles without first meeting the proposed inspection-based performance standards.

c. "The legislative intent of AB 2289 was to improve smog check in reducing pollution. In order to satisfy the Necessity standard of the California Administrative Procedure Act (APA), therefore, BAR must demonstrate the each provision[2] of the proposed regulation is necessary in order to reduce pollution. As we will explain more fully below, several of the provisions of the proposed regulation do not satisfy this standard and appear to be more for ease of administration than for purposes of reducing pollution.

Each section of the proposed regulation violates the authority requirement of Government Code § 11342.1. The enabling statutes, as amended by AB 2289 (Eng, 1010) *[sic]*, authorize regulation only to the extent that they result in emission reductions. Since the proposed regulation has no particular relation to pollution reduction, they exceed the scope of the authority granted by statute."

This comment/recommendation was rejected because:

The adoption of AB 2289 provides for several improvements to the Smog Check Program. This regulatory action deals solely with the inspection-based

[1] "low rank" refers to the rank resulting from the Station Performance Algorithm (SPA). The SPA is the basis for the proposed Follow-up Pass Rate (FPR), one of the performance measures included in this regulatory package.

[2] CA Government Code section 11349 The following definitions govern the interpretation of this chapter:
(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation *to effectuate the purpose of the statute*, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.
Title 1, Cal Code Regs § 10(b): In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include: . . . (2) information explaining why *each provision* of the adopted regulation is required to carry out the described purpose of the provision (emphasis added).

performance standards of that law. Thus, this regulatory action is necessary in order to satisfy the statutory requirements. The proposed standards measure the effectiveness of stations and technicians for the purpose of determining which stations will be eligible to inspect directed and gross-polluting vehicles.

As stated previously, the catalyst behind AB 2289 was the Sierra Research, Inc. report which estimated a loss of emissions benefits due to improper inspections to be as high as 70 tons per day. As a result, the report recommended BAR refine its station performance algorithm to better identify lower-performing stations and create incentives for higher-performing stations.

Since the proposed inspection-based performance standards examine station behavior for deviations from procedures prescribed in existing laws and regulations, it ensures that emissions benefits associated with proper inspections are achieved. Therefore, all of the proposed regulatory changes have been developed with the goal of achieving emissions reductions.

d. "The Regulations Illegally and Unwisely Rely Upon Statistical Metrics. The proposed regulations governing STAR certification consists of both objective criteria, such as technician and station citations, proper signage, possession of proper manuals and publications, tools and equipment, and artificial measurement standards, such as 'Follow-Up Pass Rate Score', 'Similar Vehicle Fail Rate', and 'Excessive Test Deviation Rate'. The artificially created measurement criteria have never been shown to have a link to poor testing methods or to increased vehicle emissions. These are merely arbitrary measurements of comparative activity of stations and technicians. The use of these statistical metrics thus violates the APA necessity standard."

This comment/recommendation was rejected because:

Though CETIA disagrees with BAR on the best method to improve the effectiveness of the Smog Check Program, this does not mean that BAR's regulations do not satisfy the necessity standard of the APA.

There is nothing inherently illegal or unwise about using statistical measures to establish acceptable standards for participation in this state-administered program.

Further, the proposed inspection-based performance standards use actual (observed) numerical measurements transmitted to BAR for every Smog Check inspection performed, this is the same as the current Gold Shield Program. This information provides BAR data to determine the current and historical performance of individual stations and/or technicians. For example, one set of data, which is collected through observed behaviors and transmitted

to BAR's central computer database, is the frequency at which the station performs a fuel cap test on a specific vehicle. The only statistical assessment is made to determine how the frequency compares to the performance of other stations and technicians statewide.

The use of a statistical assessment to determine how the performance of one business entity compares with others is a common tool for assessing qualifications for the purpose of licensing a business entity. License programs typically require potential licensees to pass an exam as qualifying criteria. The exam is designed to determine the potential licensees' factual knowledge of the subject and a statistical assessment is made to determine the percentage of correct responses necessary to pass the exam. The statistics used to determine the pass rate is generally set based on specific factors such as how the knowledge score of the applicant compares to that of other applicants, currently and historically.

For participation in the STAR Program, AB 2289 mandated that stations demonstrate eligibility based on inspection-based performance measures. Thus, rather than determine knowledge based on examination questions, BAR is proposing to assess current and historical performance based on actual data, while only applying statistics as a means of assessing the applicants' performance as compared to the performance of all stations statewide.

The proposed performance standards were initially developed by BAR and refined based on input from stations and technicians acquired at over 20 statewide workshops during a two-year period and during this regulatory process. CETIA representatives and members actively participated in this process. Plenty of opportunity was provided for comment and participation to facilitate the adoption of the inspection-based performance standards as mandated by AB 2289. The newness and generality of CETIA's assertions lack substance and as such do not appear to be a good faith effort to assist with this regulatory process; this is especially true in light of CETIA's verified support of AB 2289 in the August 23, 2010 Senate Bill Analysis.

e. "The rulemaking record contains no substantial evidence demonstrating that these measurements are related to vehicle emission levels, and no analysis has been provided to show that external factors, such as consumer behavior, economics, and equipment variability are less a significant factor in the testing results than the technician or station. These measurements appear to be based upon an unsupported assumption that a technician's or station's performance in these measurements is the only factor that impacts emissions reductions losses."

This comment/recommendation was rejected because:

As previously discussed, the Sierra Research, Inc. report was the motivation behind AB 2289. The report specifically recommends BAR refine its algorithm to identify individual stations performance. As indicated in the report, if likely high emitting vehicles were directed to stations meeting performance standards up to 70 tons per day of emissions benefits would be realized. The proposed inspection-based performance standards directly correspond to the recommendations in the report, thus the evidence of effectiveness are contained in the report, among other sources.

BAR acknowledges that factors other than the test procedures can contribute to an individual vehicle's ability to pass and/or fail a Smog Check inspection. For this reason, predicting the behavior of individual stations based upon a small sample of vehicles would be problematic; anomalies could drive the results. When large sample sizes are considered, "external factors," such as those described above, do not create substantial bias in the data. This is especially true since the analyses used by the STAR performance measures are corrected based upon similar vehicles. "Similar vehicles" are vehicles of the same make, model, test method, odometer reading, time since passing last inspection, and initial test results in the previous cycle. These factors correct for a number of different things, such as socio-economic differences in the state and consumer behavior. When these factors are considered over large data samples, systematic behavioral trends of stations and technicians emerge, thus allowing BAR to accurately identify, with a great deal of certainty, stations and technicians consistently influencing the Smog Check inspection negatively.

Health and Safety Code sections 44001.5 (b) and (c) mandate the following:

> *(b) The department shall take those actions consistent with its statutory authority to ensure that the reduction in vehicle emissions of hydrocarbons, carbon monoxide, and oxides of nitrogen meet or exceed the reductions required by the amendments enacted to the Clean Air Act in 1990.1 The department shall endeavor to achieve these vehicle emission reductions as expeditiously as practicable, but not later than the deadlines established by the amendments enacted to the Clean Air Act in 1990.*
>
> *(c) The department shall also ensure that gross polluters are identified and failed when tested pursuant to this chapter and that vehicles meeting the state standards are protected from being falsely failed.*

The proposed inspection-based performance standards will help BAR achieve its statutory mandate.

f. "These artificial measurement criteria also fail to satisfy the clarity standard of the Administrative Procedure Act[3]. In simple terms a

[3] CA Government Code § 11349: The following definitions govern the interpretation of this chapter: . . .

regulation fails to satisfy the clarity standard if those persons directly affected by the regulation cannot readily understand what must be done in order to obey the rule. By basing a technician's or a station's eligibility for certification upon arbitrary after-the-fact measurements of the outcome of the testing, the regulation provides no guidance at all as to how the licensees can assure that they are complying with the law. It is entirely possible under the proposed regulation for a licensee to become ineligible for certification even though he has never performed a single emissions test improperly. Since statistical metrics such as the 'Follow-up Pass Rate', 'Similar Vehicle Fail Rate', and 'Excessive Test Deviations' are mere statistical measurements, a station or technician could become ineligible for certification based only upon statistical sampling error[4]."

This comment/recommendation was rejected because:

The regulation meets the clarity standard in that all Smog Check licensees understand that they are required to perform proper inspections in accordance with inspection equipment prompts and the Smog Check Inspection Procedures Manual. If these two items are done routinely, the licensee will have no trouble meeting the very lenient standards for the STAR Program. This proposal creates incentives for stations and technicians to perform proper inspections and provides them the ability to self-monitor inspection performance.

The proposed performance standards, such as the "Follow-up Pass Rate (FPR)," "Similar Vehicle Fail Rate (SVFR)," and "Excessive Test Deviations (ETDR)," only identify substandard stations and technicians. Stations and technicians that perform proper inspections in accordance with the inspection equipment prompts and the Manual will qualify for STAR certification, if all other requirements have been satisfied. Further, this proposed regulatory action includes a provision (CCR section 3392.6.1) that provides an appeal process for stations in which their STAR certification has been invalidated.

g. "BAR factors set forth in this proposal such as, 'Follow-up Pass Rate', 'Similar Vehicle Fail Rate', and 'Excessive Test Deviations' are automated monitoring and measurement systems that are apparently based on unidentified assumptions[5]. While these types of solutions are

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(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

[4] The BAR implicitly recognizes this fact in one of its own publications. The BAR's web site contains a document entitled "STAR Program Questions & Answers". The answer to Question # 5.9 in this Q&A document says "Stations that make a habit of certifying vehicles with incomplete repairs (e.g., masking a fuel system problem with a new catalytic converter) may notice a lower FPR score in the long-term, but it is unlikely that this behavior alone would push the station's or technician's FPR score to an unacceptable level" (emphasis added). In saying that it is "unlikely" that factors outside the control of a station or technician would result in an FPR score that would be a basis for decertification, the BAR is implicitly acknowledging that it is possible that this could occur.

[5] As indicated previously, the rulemaking record is devoid of any indication of what these assumptions actually are or how, if at all, they are related to the emissions reduction purpose of the statute. BAR has failed to demonstrate that test deviations, follow-up pass rate score, or similar vehicle fail rate can be traced specifically to an illegal test performed, poor testing methodologies or a human performance generated variance.

present in many industries as internal control devises, it is not accepted business practice to allow assumption based measurement theories to stand exclusively as evidence for disciplinary action. It is more often taken as an indication that further review is required and action is taken when factual evidence of error or wrong-doing has been determined. CETIA would be less concerned about the use of these standards if they were limited to use as indicators of stations or technicians requiring scrutiny than we are from the currently-proposed use of these standards as a basis for decertification."

This comment/recommendation was rejected because:

No disciplinary action, such as a citation, order of suspension, or probationary order will be issued for not meeting the proposed standards. Such acts when substantiated could be the subject of enforcement actions, independent of the STAR Program.

This regulatory proposal establishes inspection-based performance standards for stations seeking to participate in the STAR Program and for the privilege to inspect directed vehicles that are most likely to fail their Smog Check inspection. As noted above, the STAR Program is a voluntary certification program. Participation is the choice of the station. Stations that have their STAR certification invalidated will be able to appeal the results and decisions regarding the station eligibility for the Program.

In determining inspection-based performance measures for use in the STAR Program, BAR relied on the Sierra Research, Inc. report, the Gold Shield Program, and improper test procedures, among others.

The Sierra Research, Inc. report specifically recommends BAR refine the current station performance algorithm to identify station performance. The proposed FPR performance standard directly corresponds to the recommendations in report, thus providing the basis for the metric and its ability to reduce emissions.

The SVFR, or Comparative Failure Rate (CFR) in the Gold Shield Program, is a current performance measure that has been further refined for accuracy in the STAR Program. BAR relied on the success of the CFR in the Gold Shield Program as it's rational for utilizing the SVFR in this proposed regulatory action.

The ETDR is a very simple performance measure as it looks at whether or not certain aspects of an inspection have been performed. Deviating from inspection procedures currently represents a violation of BAR's laws and regulations. Including a measure that monitors the performance of

components of the inspection is easily understood because it observes the actions of a technician during an inspection.

Such acts when substantiated could be the subject of enforcement actions, independent of the STAR Program.

h. "The statistical metrics also appear to violate the APA requirement that regulations be within the scope of the authority conferred by statute[6]. The authority and reference statutes[7] only authorize BAR to adopt 'inspection-based performance standards.' The statistical metrics employed in the proposed regulations do not require any BAR inspection of the station or technician. The proposed statistical standards are not 'inspection-based' standards as required by law and therefore are not within the scope of authority conferred by statute and are thus illegal."

This comment/recommendation was rejected because:

The inspection-based performance standards identified in AB 2289 are not intended to be a requirement for a BAR employee to physically inspect a station, but rather a tool to measure the accuracy of Smog Check inspections performed at Smog Check stations; thus, the term "inspection-based." This component was added to AB 2289 at the request of the Test-and-Repair associations to level the playing field, as their members are currently being held to repair criteria in the Gold Shield Program, which Test-Only stations cannot be required to meet due to their license classification prohibiting emissions-related repairs. An interpretation that a physical inspection was not intended is supported by the fact that AB 2289 did not include any provision for adding additional BAR staff to physically inspect stations as a condition of certification.

The intent of AB 2289 can be further solidified based on the August 23, 2010 Senate Floor Analysis which supports this assertion:

> *"[AB 2289] Requires BAR to establish performance standards based on inspection data derived from the station that each test-only stations and Gold Shield [Test-and-Repair] stations must meet in order to be eligible to issue certificates of compliance and noncompliance for directed vehicles."*

AB 2289 provided BAR broad authority to develop inspection-based performance standards that could be applied to both Test-Only and Test-and-Repair stations. As a result, the chosen performance measures have been included in this proposed action to identify proper inspection behaviors for the purpose of certifying higher-performing stations.

[6] CA Government Code § 11342.1
[7] CA Health and Safety Code §§ 44014.2(a), 44014.5(d)(2)(A)

i. **"The use of statistical metrics will fundamentally alter the nature of testing in harmful ways. They will increase the rate at which vehicles fail their emissions tests and will increase the number of unnecessary tests. In an apparent effort to reduce the incidence of vehicles that are allegedly passed improperly, BAR has created a perverse incentive for stations and technicians to fail vehicles improperly. Every statistical metric proposed in the regulation will be maximized by a station or technician maximizing the failure rate for tested vehicles or performing possibly unnecessary tests.**

Consider the Similar Vehicle Failure Rate (SVFR), which requires that a station failure rate must be greater than or equal to 75% of the failure rate for similar vehicles. The obvious way for a station or technician to ensure that their SVFR is adequate is to favor producing test failures. The proposed regulations explicitly recognize that actions by a technician can affect the outcome of a vehicle test. For example, in justifying creation of a definition of 'Gear Shift Incident', BAR says that 'Shifting a vehicle transmission into the wrong gear during an ASM test is a quick way to improperly pass vehicles undergoing Smog Check inspections.' Just as there are ways in which an improperly performed test can increase the probability of passage, there are going to be methods discovered to cause improper failures. Since the statistical metrics reward stations with above-average failure rates, they will inevitably create an economic incentive for stations to favor improper vehicle test failures."

This comment/recommendation was rejected because:

Currently, stations that perform low-quality and improper inspections enjoy an advantage in the marketplace because these inspections often bypass required inspection procedures and result in cheaper inspections. Cheaper inspections are sought by consumers hoping to save money over a more costly and comprehensive Smog Check inspection, which can result in a consumer avoiding necessary emissions repairs to their vehicles.

By requiring stations that want to inspect the state's likely high-emitting vehicles to meet inspection-based performance standards, higher performing stations will gain the benefit of inspecting directed vehicles without having to compete with stations interested in consistently gaming the inspection to make their customers happy or to increase profits.

The program currently in use allows for the direction of likely high-emitting vehicles to both Test-Only and Gold Shield stations. Test-Only stations are limited to performing inspections without repairs (except for replacement of leaking gas caps and minor vacuum hose routing adjustments), while Gold

Shield stations are required to meet limited performance standards and can perform emissions repairs.

CETIA's comments imply that the industry is actively seeking out methods to deceive consumers and undermine the effectiveness of the Smog Check Program. BAR feels this characterization of the industry is not accurate and is not representative of the industry as a whole.

AB 2289 and this proposed regulatory action work in conjunction to serve the Bureau's overarching goal of implementing a model motor vehicle emissions-reduction program. The Sierra Research, Inc. report further cemented the idea stations and technicians can manipulate Smog Check inspection results. Reducing fraud will increase the Smog Check inspection failure rate and generate emissions reductions benefits.

This latter comment regarding stations intentionally failing a consumer's vehicle is an editorial comment that does not affect the legal basis of this regulatory action. Consumers can and do seek second opinions when their vehicle improperly fails a Smog Check inspection, either at another Smog Check station or through a BAR referee station. In addition, consumers may file a complaint that could result in disciplinary action of the station and or technician and monetary reimbursement.

However, it should be noted that rather than introducing a "perverse incentive" to the industry, this regulatory action seeks to correct an existing perverse incentive already influencing the industry. Specifically, Smog Check stations and technicians pass far more vehicles than would be the case if all Smog Check inspections were performed properly. It appears, based on BAR enforcement cases that some stations improperly pass vehicles to garner more consumer loyalty for delivering to consumers what they want: a passing Smog Check result. This is a conflict considering the goal of the program is to achieve emissions reductions through the identification and repair of high polluting vehicles. As reported in the Sierra Research, Inc. report, Smog Check failure rates should be approximately 1.5 times higher than they are currently if the inspection-based performance standards were used.

j. "Furthermore, there are many factors, such as modified transmissions or nonstandard wheel or tire sizes which can result in a Gear Shift Incident in a perfectly conducted test. The use of this metric violates the APA clarity standard because a person subject to the regulation cannot determine what actions are certain to comply with the rule. It violates the necessity standard because the rulemaking record is devoid of any evidence demonstrating that this rule is necessary to achieve the purpose of the statute."

This comment/recommendation was rejected because:

The proposed performance measures do not violate the APA clarity standard because the compliance requirement is clear: perform proper inspections in compliance with the prescribed test procedures set forth in BAR laws and regulations. Specific to the Gear Shift Incident standard, the proper way to conduct the inspection is to test the vehicle in drive for automatic transmission vehicles or in second gear for manual transmission vehicles unless otherwise directed by the established test procedures.

Proper gear selection during an ASM test is critical for the accuracy of the ASM test. Downshifting into a lower gear during a test is a common practice among stations performing improper inspections because it can mask emissions problems, especially those that cause high NOx readings. Furthermore, selection of the correct gear is extremely simple; there is no acceptable reason why a technician would not select the correct gear during an inspection.

The standard proposed for the gear shift performance measure is extremely lenient in nature. As such, modifications to tire and wheel size or the transmission would have to be extreme before they could cause a gear shift incident. For instance, large diameter tires often installed on customized trucks will not cause a gear selection incident because they will tend to push the engine RPM lower, not higher. We are not aware of any common transmission modifications that would inherently cause a gear selection incident. It would be more common for a malfunctioning transmission to cause a gear selection incident, but even that would be extremely rare. Furthermore, to account for an occasional malfunctioning transmission, stations are allowed to have up to 2% of the tests performed at the station identified as being shifted into the incorrect gear without any consequences. The majority of stations will not even register a single gear selection incident in a calendar quarter; while the minority will have more than 2% with gear selection incidents.

k. "The use of the Excessive Test Deviation Rate (ETDR) will likewise result in sanctions being imposed improperly upon stations and technicians. There are a variety of reasons why a properly conducted vehicle test will result in deviations for which a licensee may be sanctioned. A test may be aborted because computer interface errors in World Wide Analyzers, which stations are required to employ, cause computers to freeze or otherwise fail to complete the test. This happens frequently and is entirely outside of the control of the stations or technicians. It is common for tests which are conducted perfectly to produce test deviations. The use of this metric, therefore, does not fall within the scope and authority of the statute since it does not measure anything related to reduction of vehicle emissions. It violates the APA clarity standard because a person subject to the regulation cannot determine what actions are certain to comply

with the rule. It violates the necessity standard because the rulemaking record is devoid of any evidence demonstrating that this rule is necessary to achieve the purpose of the statute."

This comment/recommendation was rejected because:

As previously discussed, the proposed performance measures do not violate the APA clarity standard because the compliance requirement is clear: perform proper inspections in compliance with prescribed test procedures set forth in laws and regulations. The Excessive Test Deviation Rate (ETDR) examines several different station performance components. These include the failure to perform, when required, four specific Smog Check inspection components: ignition timing test, fuel cap test, low pressure fuel evaporative test, and OBD II test. In addition, the ETDR examines three specific station behaviors affecting the accuracy of the Smog Check inspection results: frequency of aborted tests, frequency of restarted tests, and frequency with which vehicles pass with exactly the maximum number of allowable OBD II readiness monitors. The proper performance of all these components is prescribed by existing laws and regulations.

This proposed regulatory action defines the Excessive Test Deviation Rate for the four specific Smog Check inspection components: ignition timing test, fuel cap test, low pressure fuel evaporative test, and the OBD II test as the rate that exceeds the statewide average for similar vehicles where 90% of the similar vehicles received the test. In other words, the rate is determined based on reporting on a vast majority (90%) of the industry. For example, based on Smog Check inspections during January through June 2011, a fuel cap test was performed on 99.2% of the 1997 Chevrolet Suburbans with 350 cubic inch engines. This means that almost all of the individuals performing Smog Check inspections on these vehicles determined that it was necessary to perform a fuel cap test pursuant to Smog Check inspection procedures.

Furthermore, if there is not substantial agreement in the industry on the ability to perform one of the required test for a particular vehicle (less than 90% agreement), that group of vehicles will not be considered in measuring the station's performance in meeting the specific test deviation standard being evaluated.

Using this example, a test deviation would occur if the individuals reported through the entry into the inspection equipment that a fuel cap test was not possible. BAR has found that many stations do not have any deviations indicating that the majority of the individuals performing the inspections are in agreement as to whether or not the test should be performed and as such the standard of 90% is considered to be very lenient. Using the test deviation, the ETDR is calculated and would only occur if the percent (or rate) of individual test deviations exceeded the percent (or rate) observed for other stations.

Specific to the comment regarding differences between Smog Check test equipment impacting a stations' aborted inspection rate and test deviations, the expected abort rate for each station is adjusted based on the brand of Smog Check test equipment. As a result, stations that use equipment with software inherently more likely to unintentionally abort a test will not be at a disadvantage with respect to this metric.

Thus, if a station obtains an ETDR, the number of test deviations and the percent of test deviations compared to other stations would indicate that the Smog Check tests was being improperly performed, resulting in loss of emissions benefits.

Stations that receive two or more ETDR's in two consecutive quarters will have their STAR certification invalidated. The proposed action provides for an appeal process in which a station can explain anomalies, if any, that impacted the station's ability to meet the performance measures.

l. **"The metric which penalizes stations and technicians for conducting too many tests with the maximum permissible number of OBD II monitors unset violates the constancy standard of the APA. The regulations expressly permit two readiness monitors to be unset at the time of testing, but they penalize a station or technician for doing this too often. Thus they create a situation in which a licensee may be sanctioned for performing a test under circumstances which are specifically identified as lawful."**

This comment/recommendation was rejected because:

BAR is unaware of a "constancy standard" that is required by either the Office of Administrative Law or the California Government Code. As such, BAR believes the commenter is referring to the consistency standard required by Government Code section 11344(d) and California Code of Regulations, Title 1, Section 14(c)(1).

It is true that the maximum permissible number of OBD II monitors is specified by regulation (CCR section 3340.42.2) at two for 1996 to 2000 model-year vehicles and at one for 2001 and newer model-year vehicles. These maximum permissible limits establish the point beyond which the vehicle will fail the OBD II portion of the Smog Check test, and are based on the guidance of the USEPA.

OBD II monitors, when "set," indicate whether or not the specific vehicle's self-diagnostic tests on its emissions control components have been performed. If the monitor has not run the OBD II system cannot determine if the specific emissions control components are properly working. Basically,

the OBD II system works as a self-contained Smog Check inspection for newer model vehicles.

In some cases, not all of the self-diagnostic tests have been performed, and as a result the monitors are not "set." When this occurs for "natural reasons," unset readiness monitors do not indicate an intention to circumvent the Smog Check Program. For example, if a car's battery went dead and was replaced soon before performing a Smog Check inspection, the vehicle's computer could have been unintentionally reset during this process, thus indicate unset readiness monitors. Another reason that unset readiness monitors might occur is related to OBD II problems for specific vehicles that may have difficulty setting certain monitors. For example, some early OBD II vehicles reset the computer every time that the vehicle was turned off. In such cases, slow reacting monitors will often appear unset.

It was for isolated circumstances such as these examples that the USEPA permits some unset readiness monitors during Smog Check inspection. If the USEPA did not allow for some unset readiness monitors the test would be far too burdensome for some motorists to pass the test.

Naturally occurring unset OBD II readiness problems such as those mentioned will tend to be evenly distributed across large samples of similar vehicles. Stations with similar behavior have comparable not-ready rates among similar vehicles, and would not trigger a test deviation in these instances.

Stations that will stand out from others, however, are those that intentionally reset computers prior to inspection in order to affect the test outcome. The process for doing this is as follows:

A vehicle is presented for Smog Check testing with a check engine light illuminated, indicating that a self-diagnostic monitor is complete (has been set), and there is a problem with one of the vehicle's emissions control components for which the vehicle would fail its Smog Check inspection. The technician, rather than fail the vehicle and potentially upset the consumer, will then reset the computer and advise the consumer to drive the vehicle until the maximum allowable number of unset monitors has been reached. If the offending monitor is slow to run, the vehicle may be able to pass the OBD II portion of the Smog Check inspection before the offending monitor has time to run, which is the reason for the USEPA's generous readiness limits. In such cases, the technician knowingly circumvented the Smog Check Program by falsely passing a vehicle in need of emissions repairs. This behavior is clearly not representative of the sort of behavior desired for the STAR Program.

Stations that engage in this sort of behavior will have elevated percentages of vehicles passing the OBD II portion of their initial inspection with the exact number of unset readiness monitors allowed.

To ensure that stations are not unduly excluded from the STAR Program based upon this deviation, the maximum allowable unset OBD II readiness monitors is up to 125% of the statewide average for similar vehicles. Stations would need to have two ETDR's for two consecutive quarters prior to having their STAR certification invalidated. Stations that perform proper inspections will not be penalized.

Further, stations will have multiple opportunities to correct behaviors before invalidation. In the case of the EDTR, under which the maximum allowable unset OBD II monitor, stations are allowed to have one deviation per quarter without consequence and will not be invalidated until the station fails to meet the short-term measure for two consecutive quarters. At that point, the invalidation process is initiated; a station can always appeal to explain the reason for any apparent anomalies in their test deviations.

m. "The use of any metric which is based upon statewide averages creates a unique problem. By definition one half of all stations and technicians will inevitably have metrics that are below the statewide average. By decreeing that a score below a statewide average is a basis for denial of certification or decertification, therefore, the regulations will inevitably result in imposing a sanction upon one half of all licensees will fail on this metric. This problem is cumulative. Once the below-average licensees are removed from the system, there will necessarily be a new statewide average. The score of this average will be higher than the previous score was, but one half of the remaining population will still be below this average and will thus fail on this metric. The use of statewide average as a standard for performance, therefore, will inevitably and continuously eliminate licensees. The nature of a statewide average is such that this will always be true. No matter what the statewide average is, one half of the licensees will not meet this metric because one half of the population will always be below the average. That's what an average is. The use of a statewide average as a metric violates the clarity standard of the APA because a person subject to the regulation has no way to determine what actions will comply with the rule. The use of a statewide average violates the necessity standard of the APA because the rulemaking record contains no substantial evidence to demonstrate that any station or technician below this average is unsuitable for certification. The use of any statewide average as a metric violates the authority requirement of Government Code section 11342.1 because it imposes a rule that is outside of the scope of the statute, which is to adopt standards which will reduce pollution."

This comment/recommendation was rejected because:

The proposed regulations do not violate the APA clarity standard because the compliance requirement is clear: perform proper inspections in compliance with prescribed test procedures set forth in BAR laws and regulations.

Averages are used to define inspection-based performance standards that identify behaviors associated with the lower performing stations. As a result, only higher performing stations are able to participate in the STAR Program. The use of averages is appropriate as it identifies outliers, or in case of the STAR Program behavior that differs substantially from the rest of the industry for similar vehicles. In essence, stations are being judged by their peers.

The STAR Program is intended to incentivize higher-performing stations. As noted previously, vehicles that should fail an inspection and receive the appropriate emissions repairs are being improperly inspected and certified as passing without the appropriate repairs. As a result, the emissions reductions attributable to the program are not being realized

The proposed standards are quite lenient and will not result in a STAR certification being invalidated unless the station receives two or more ETDR's in two consecutive quarters. The proposed action provides for an appeal process in which a station can explain anomalies, if any, that impacted the station's ability to meet the performance measures.

n. "The use of statistical metrics exceeds the authority granted by statute and violates the necessity and clarity standards of the APA. The regulation should be amended to eliminate the use of statistical metrics and employ only inspection-based objective metrics which comply with the APA and which will not create harmful consequences in the market."

This comment/recommendation was rejected because:

The use of statistical metrics as a basis for inspection-based performance standards meets the necessity and clarity standards of the APA. The necessity standard is met since AB 2289 requires BAR to establish inspection-based performance standards pursuant to H&S 44010.5 and 44014.7. While AB 2289 limited the standards to inspection-based, the details as to how the performance standards were to be developed were delegated to BAR. As a result, BAR relied on the precedent established by the Gold Shield Program and similar performance standards. The author, committees, and industry were well informed as to BAR's intent of building the STAR Program based on the framework of the existing Gold Shield Program.

CETIA indicated in its written comments that it actively participated in the development process for AB 2289. As such, it should be abundantly clear that

AB 2289 intended for BAR to utilize the recommendations of the Sierra Research, Inc. report, and the Gold Shield Program, among others to develop inspection-based performance standards that can be applied to both Test-Only and Test-and-Repair station classifications.

The clarity standard is met because the compliance requirement is clear: perform proper inspections in compliance with current test procedures set forth in laws and regulations.

o. "The Proposed Regulation Improperly Employs Incorporation by Reference. Proposed section 3392.3.1(a) requires a station seeking STAR certification to submit to the bureau 'a completed STAR Station Certification Application form (STAR-1 07/1/2012), which is hereby incorporated by reference.' This provision violates the APA both substantively and procedurally.

Incorporation by reference is only permitted when 'it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations[8]'. Thus the incorporation by reference of the Smog Check Inspection Procedures Manual, which is incorporated by reference in section 3340.45, is appropriate. However, an application form will presumably be only a few pages long and, thus, can easily be published in full in the Code of Regulations.

In any case, this cannot be definitively determined based upon the current rulemaking record. The STAR Station Certification Application form (STAR-1 07/1/2012) does not appear to exist at this time. It was not attached to the text, the Notice of Proposed Action, or the Initial Statement of Reasons associated with this rulemaking. It is not available on the BAR web site. The fact that it is identified with a date in July of 2012 also indicates that the document does not presently exist. Whether or not the document is determined to be appropriate for incorporation by reference, the APA requires that the document be made available for public comment[9]. We call upon BAR to develop the STAR Station Certification Application form (STAR-1 07/1/2012) and to make it available for public comment."

This comment/recommendation was rejected because:

At the start of the formal comment period BAR posted the requirements for STAR certification on its public Web page at http://www.bar.ca.gov/Pubwebquery/STAR/STAR_application_requirements.pdfrequest; however, viewing of the document was limited to the second page

[8] Title 1, Cal. Code Regs. § 20(c)(1)

[9] Title 1, Cal. Code Regs. § 20(c)(2)

because BAR did not want to invite applications for a program that was not yet in effect. This action was not intended to limit public participation, but rather to prevent confusion among licensed stations attempting to apply for STAR certification. Additionally, no person made any written or oral requests to view the STAR certification application.

Subsequently, based on this comment, BAR mailed the document to all interested parties during the 15-day notice of modified text. Further, the full application is available for examination on BAR's public Web page at http://www.bar.ca.gov/80_BARResources/05_Legislative/RegulatoryActions/RegulatoryActions.html and continues to be available upon request.

However, BAR does not agree that incorporation by reference of the STAR Station Certification Application form (STAR-1 07/1/2012) violates the APA, as the commenter suggests. Incorporating this application by reference is a prudent and cost-effective means of publishing documents without unnecessarily cluttering the regulations governing the Smog Check Program, provided these documents are readily available at all of BAR's field offices and on its Web page. Printing the STAR Program application as part of the regulation or placing the provisions of the application in the regulation text unnecessarily takes up more space as compared to incorporating by reference.

The STAR Application date of "7/1/2012" was intentionally selected to inform applicants that no applications for STAR certification may be received before July 1, 2012. Post-dating the application helps to establish the effective date of the application on July 1, 2012.

p. "BAR Has Failed to Assess Economic Impact Correctly. The APA has a variety of requirements which require an agency adopting regulations to assess the economic impact of proposed regulations[10]. Although the Initial Statement of Reasons and the Notice of Proposed Action contain statements suggesting that BAR has assessed these issues, the BAR assertions on this issue are incorrect.

The BAR has not provided accurate or sufficient analysis of the economic impact to business in the 'Initial Statement of Reasons'. In BAR workshop presentations and their own analysis, over 1000 test-only stations will be prohibited from participating in the STAR Program. Without certification, these businesses will not be viable. At a minimum, 1000 stations state-wide will close.

The BAR has not provided accurate or sufficient analysis of the impact to jobs in the 'Initial Statement of Reasons'. The program will generate the loss of 3100 jobs state-wide corresponding to the above mentioned BAR analysis and resulting station closures."

[10] See, for example, CA Government Code §§ 11346.2(b)(5), 11346.3, 11346.5(a)(8), 11346.5(a)(9),

This comment/recommendation was rejected because:

The commenter states that BAR, during workshops and analysis, identified the projected closure of 1,000 stations and the loss of 3,100 jobs. BAR is unaware of any study in which it identified these figures or any analyses performed by outside entities on the number of stations or jobs impacted by this regulatory action. Because participation in the STAR Program is 100% voluntary, neither BAR, CETIA, nor any other entity can with any deal of certainty, assess business closures or job losses, or for that matter businesses opening and job creation, relative to the STAR Program. In order to perform such a calculation, the following factors would have to be known: number of stations or technicians that will voluntarily choose to participate; how many stations or technicians will choose to meet the qualification criteria; the positive impact of the workshops; the ability to assess one's performance on the Web page; and the impact of directed vehicles on each station's revenues.

It is important to note that this proposed action does not change the number of vehicles that must receive a Smog Check inspection nor the directed vehicle volume. As such, the overall economic value of the Smog Check Program to businesses will remain constant. In assessing the economic impact to Smog Check stations, BAR thoroughly examined the industry as a whole. BAR has determined there will be a redistribution of inspection volume between participating and non-participating stations, but overall this proposal does not create any statewide economic impact.

q. "The BAR has underestimated the cost to BAR enforcement, Administrative Law processes and stress on existing resources. In the 2010-2011 fiscal year BAR issued over 1500 citations but only 207 of that number took advantage of the administrative appeal process. If these regulations go into effect, a station owner will have no alternative other than to appeal the citation because acceptance of the citation would result in the termination of their STAR classification and cause the closure of that business. Therefore, CETIA projects the number of administrative actions will significantly increase, straining limited resources and rapidly increasing cost to the State. This impact on state budgeted resources has not been addressed in the BAR regulatory analysis. Weighting has not been provided for behaviors that impact/do not impact air-quality that are cited, and since STAR decertification is excessively punitive for minor citation issues, it will be necessity for station owners to initiate the administrative process for ANY citation received rather than lose their business."

This comment/recommendation was rejected because:

As indicated in the Economic and Fiscal Impact Statement (STD. 399), there is no fiscal impact to the state as a result of this regulatory action. This regulatory action seeks to establish inspection-based performance standards and a voluntary certification program for stations that meet the performance standards and are authorized to inspection directed vehicles. The STAR Program is replacing the existing Gold Shield Program. As a result, BAR can redirect staffing allocated with the Gold Shield Program to the STAR Program. The STAR Program involves a certification process, automated reporting of qualification status, and monitoring using the automated reporting process will help to reduce overall workload.

The STAR Program provides a greater incentive for stations to perform accurate inspections on a more consistent basis by linking the STAR Program to the privilege of inspecting vehicles selected by factual data, which identifies which vehicles that are likely high-polluting and in need of repair. As a result, BAR anticipates an initial influx of certification applications. However, based on prior experience BAR expects the ongoing volume of voluntary participants seeking certification to level out. Thus, the ongoing workload associated with a stable program, taking into account the new automated efficiencies, should be consistent with the existing Gold Shield Program.

The number of STAR Program stations that will be subject to invalidation procedures is difficult to assess. While there will be more STAR stations than stations currently participating in the Gold Shield Program, STAR stations will have the ability to self-police themselves and have time to correct behaviors that would be the cause of invalidation. In the case of EDTR, stations are allowed to have one deviation per quarter without consequence and will not be invalidated until the station fails to meet the short-term measure for two consecutive quarters. At that point, an invalidation process would be initiated. Given the number of opportunities provided to stations to resolve their performance issues or disputed action to invalidate their STAR certification, BAR anticipates few cases reaching the appeals stage. BAR expects to absorb the workload that will be shifted from the current Gold Shield Program to the STAR Program.

As a result of the STAR Program, BAR expects that stations and technicians will voluntarily seek to perform more accurate Smog Check inspections. Stations will have an incentive to do so in order to earn or maintain STAR certification. As overall performance of the Smog Check Program improves, the burden on the BAR Enforcement Division should actually decrease to a manageable level as stations will be much more self-policing than is currently the case. While stations may have additional incentive to fight citations, BAR expects that the number of citations may actually decrease as stations strive to perform more accurate Smog Check inspections.

With respect to appeals, AB 2289 recognized that an appeals process within BAR modeled after the one used by BAR in the Gold Shield Program would expedite decisions on matters impacting air quality, specifically whether a station that was not meeting the performance standards would continue to be eligible to inspect the state's highest-polluting vehicles. At the conclusion of the informal conference, the BAR Chief or designee may choose to affirm, modify, or dismiss the proposed invalidation of a STAR certification based on information presented during the meeting. Workload with an informal appeals process can be absorbed within existing staffing allocations, as the appeal process already exists with the Gold Shield Program.

BAR has revised the eligibility for STAR certification and the causes for invalidating a STAR certification by removing from these regulations the ability to issue a citation for violations that do not impact air quality. BAR determined that minor citations (i.e., paper work violations) should not constitute a reason to prevent a station from obtaining STAR certification or for the invalidation of an existing certification.

r. "The BAR has not addressed and considered the costs of maintaining the existing tailpipe testing network, its impact on the market price for consumers requiring tail-pipe testing or the increased financial burden on low-income Californians. We can only presume the BAR assumes that all equipment in market is fully amortized since the issue is not addressed in their analysis. Further, the BAR continues to license new Test-Only stations and has not taken into consideration the ongoing expense of maintaining that equipment. In BAR's attempt to restructure the existing market into an OBDII and STAR network of Tailpipe testing, a solution has not been presented on how to maintain the existing tail-pipe network without causing the inevitable escalation of costs to consumers or to compensate existing station owners in market having not fully recovered the cost of equipment.

Also, the law requires the state to pay remediation of $10,000 to stations which are decertified. The economic analysis of the proposed regulation has not taken this into account. The regulations, if implemented as proposed, will likely result in hundreds or thousands of stations being decertified. This will result in a cost to the state of many millions of dollars."

This comment/recommendation was rejected because:

This comment is not germane to this regulatory action. The commenter is referencing a provision of AB 2289 involving the option for the state to deploy new testing equipment. This regulatory action only establishes the inspection-based performance standards for stations to have the privilege of testing directed vehicles pursuant to Health and Safety Code sections 44014.2

and 44014.5. AB 2289 does provide BAR authority to modify testing procedures for certain vehicles, namely OBD II-equipped vehicles model-years 2000 and newer. Stations planning to test this group of newer model-year vehicles will obviously need to purchase any equipment required to perform the inspection. These changes will be pursued in separate regulatory packages. The associated economic impact will be assessed at that time.

The assertion that the "law requires the state to pay remediation of $10,000 to stations which are decertified" is untrue. BAR is unaware of any requirement within its statute or regulations requiring remediation of $10,000 for stations that are decertified. Since CETIA has not referenced a specific statute or regulation regarding remediation, BAR is left to presume that CETIA is mistakenly interpreting H&S 44036 (c)(2).

> *44036(c)(2) If existing smog check stations licensed pursuant to this chapter or training institutions certified pursuant to Section 44030.5 are required to make investments of more than ten thousand dollars ($10,000) to acquire equipment to meet the requirements of this subdivision, the department shall submit recommendations to the Governor and the Legislature for any appropriate mitigation measures, including, but not limited to, subsidies, equipment leases, grants, or loans.*

The performance improvements proposed in this regulatory action are necessary independent of any inspection procedure or equipment changes that may be required in the future.

s. "Additional Objections to Specific Sections. In addition to the objections raised above, the following specific sections of the proposed regulations violate the requirements of the APA.

3340.1 – Definition of Excessive Test Deviation Rate. The repeated use of the phrase 'test is not performed on vehicles for which it should be performed' violates the clarity standard because it provides persons subject to the regulation with no guidance on when a test 'should' be performed."

This comment/recommendation was accepted, in part, as follows:

BAR amended the definition to provide more clarity regarding how the Excessive Test Deviation Rate is determined. The modified definition will read as follows:

> *"'Excessive Test Deviation Rate' occurs under any of the following circumstances in a calendar quarter:*

(1) The rate for which the ignition timing test is not performed exceeds the statewide average for similar vehicles where 90% of similar vehicles received the test.

(2) The rate for which the fuel cap test is not performed exceeds the statewide average for similar vehicles where 90% of similar vehicles received the test.

(3) The rate for which the low pressure fuel evaporative test is not performed exceeds the statewide average for similar vehicles where 90% of similar vehicles received the test.

(4) The rate for which the OBDII inspection is not performed exceeds the statewide average for similar vehicles where 90% of similar vehicles received the test."

Further, BAR's Smog Check Inspection Procedures Manual requires inspections to be performed unless certain exceptions, listed in the Manual, apply. The technician ultimately interprets each vehicle situation to determine whether or not an exception may apply. Further, a deviation will only occur if the technician failed to perform a test when greater than 90% of the other similar vehicles were capable of receiving the test. Even if an exhaustive list of test procedures was possible to develop for each and every vehicle, the list could never contain every unique circumstance which may justify bypassing certain components of a test. In essence, publishing this list is not feasible or practical.

t. "3340.1 – Definition of Follow-up Pass Rate. The proposed definition violates the clarity standards because it does not define how a rate is calculated."

This comment/recommendation was accepted because:

The Bureau determined it necessary to provide more specificity and clarity as to how the Follow-Up Pass Rate (FPR) would be calculated. The updated definition satisfies the APA clarity standard and was included in the first 15-day notice as follows:

"'Follow-up Pass Rate (FPR)' means a performance measure that evaluates whether vehicles previously certified by each station or technician are passing, in their current cycle, at higher than expected rates. Expected rates are calculated by averaging passing rates for similar vehicles, and then adjusting the rates to account for an individual vehicle's odometer reading, the type of emissions inspection (ASM or TSI) performed in the current inspection cycle on the vehicle, the amount of time since the last certification for the vehicle, and the initial test results in

the previous inspection cycle. An FPR score is assigned to both licensed smog check stations and technicians, and is based on the current inspection cycle test results of vehicles that were previously certified by stations and technicians. An FPR score ranges from zero to one, with zero representing the lowest possible score and one representing the highest possible score. FPR data reports are updated in January and July each year. Stations and technicians with insufficient inspection histories from which to calculate an FPR score will not receive an FPR score."

The modified language presents information in a format easily understandable by persons directly affected by the regulation.

As currently proposed, the definition provides clarity in that it describes how the score is assigned, the value of the score (zero to one), the rating of the score (zero representing lowest possible score and one representing the highest possible score) and when the scores will be updated (in January and July).

In addition to the definition, proposed CCR section 3392.3.1 (a)(4) specifies the acceptable FPR rate or score(s) for eligibility for STAR certification and section 3392.5.1(a)(5) - (8) specifies the FPR rate or score(s) that would be cause for invalidation of a STAR certification.

With these revisions to the definition, the proposed regulatory text meets the APA clarity standard. Additionally, more information regarding the FPR rates (or scores) is provided in the underlying data identified in the ISOR (4. Current and Historical STAR PowerPoint presentations). For example, the June 2010 PowerPoint presentation "Proposed Gold Shield Performance Criteria" states that FPR scores reflect probability that a technician's vehicles pass at a higher rate than average in the next inspection cycle. The presentation includes further detail as follows:

- Scores range from 0 to 1
- 0 score means we are 100% confident that performance is below average
- 1 score means we are 100% confident above average
- 0.5 means we don't know conclusively due to insufficient test history
- New or low-volume technicians assigned 0.5 score

In the case of the FPR, the measure considers whether vehicles previously certified by each station or technician are failing, in the current inspection cycle, at a rate higher than expected based upon inspection results from

similar vehicles throughout the state. Vehicles that were properly inspected in the previous inspection cycle will fail at a lower rate in the current cycle than vehicles that were improperly inspected in their previous inspection cycle.

u. "3340.1 – Definition of Similar Vehicle Failure Rate. The proposed definition violates the clarity standards because it does not define how the rate is calculated. The phrase 'taking into account' is particularly vague and imprecise."

This comment/recommendation was accepted, in part, because:

Upon a more thorough review of the proposed regulation text, BAR determined it was necessary to clarify the definition of Similar Vehicle Failure Rate (SVFR) to add the words "vehicles at" before "an individual station," as shown below. This change was made during the first 15-day notice.

> *"'Similar Vehicle Failure Rate' or 'SVFR' means a calendar quarter comparison of the initial test failure rate of vehicles at an individual station to the initial test failure rate for similar vehicles inspected statewide, taking into account the vehicle odometer reading, time since passing the last inspection, and initial test results in the previous cycle. Vehicles for which data is not available to adequately establish an initial test failure rate will not be used in the SVFR calculation. This paragraph shall become effective July 1, 2012."*

The Bureau has made a determination that the phrase "taking into account" is easily understood by person affected by the proposed regulation and is appropriate for this definition. The SVFR is further defined based on the vehicle odometer reading, time since the last inspection, and initial test results in the previous cycle.

In addition, the term "similar vehicles" was revised during the first and second 15-day notice to read as follows:

> *"'Similar vehicles' means vehicles with the same Vehicle Lookup Table Row ID, or at a minimum, vehicles with the same model-year, make, and engine displacement."*

The changes made to both of these definitions provide further clarity regarding which vehicles will be used for the SVFR performance measure, thereby satisfying the clarity standard of the APA.

v. "3340.1 – Definition of Test Deviation. The repeated use of the phrase 'a vehicle that should receive this test' violates the clarity standard because

it provides persons subject to the regulation with no guidance on when a vehicle 'should' receive a test."

This comment/recommendation was rejected because:

The use of the phrase "a vehicle that should receive this test" is included in the proposed definition of test deviation to clarify that a test deviation would only occur when the specific test is required. Thus, a test deviation would not occur if, for example, a fuel cap test was not performed on a 1975 model-year vehicle since a fuel cap test is only required on 1976 to 1999 model-year vehicles equipped with evaporative controls, including dual-fueled vehicles.

Since information as to performance of the Smog Check inspection is already specified in the Smog Check Inspection Procedures Manual incorporated by reference pursuant to section 3340.45 of the California Code of Regulations, the information was not repeated in the proposed definition to avoid duplication. The Manual lists the various elements of a Smog Check inspection and instances when one of the required inspections may be executed for certain model-year vehicles. The technician ultimately interprets each vehicle situation to determine whether an exception may apply. Even if an exhaustive list of test procedures was published for each vehicle the list could never contain every unique circumstance which justifies bypassing certain components of a test. In essence, publishing this list is not feasible or practical.

Thus, the definition of test deviation as included in the proposed section 3340.1 does not violate the APA clarity standard or the non-duplication standard.

w. "3392.3.1(a)(1) – The requirement that a station maintain a Similar Vehicle Failure Rate greater than or equal to 75% of the industry-wide failure rate violates the authority, reference, and necessity standards of the APA. The rulemaking record provides no information suggesting that this standard relates to reduction of pollution, explaining the basis for selecting the 75% standard, *[sic]*"

This comment/recommendation was rejected because:

Proposed section 3392.3.1(a)(1) states that the station's Similar Vehicle Failure Rate (SVFR) in the most recently completed calendar quarter shall be greater than or equal to 75% of the industry-wide failure rate for similar vehicles as defined in Section 3340.1. Proposed section 3340.1 defines the SVFR as a calendar quarter comparison of the initial test failure rate of vehicles at an individual station to the initial test failure rate for similar vehicles inspected statewide, taking into account the vehicle odometer

reading, time since passing the last inspection, and initial test results in the previous cycle. The definition in proposed section 3340.1 further states that vehicles for which data is not available to adequately establish an initial test failure rate will not be used in the SVFR calculation.

The "authority" and "reference" standards are met because AB 2289 specifically requires BAR to develop inspection-based performance standards.

The precedent of the Gold Shield Program and ultimately the success of the Comparative Failure Rate (CFR) in identifying higher-performing stations has lead BAR to incorporate the same performance standard into the proposed STAR Program. This standard has been re-titled SVFR to provide more clarity regarding what the standard will be assessing. Further, the CFR (or SVFR) standard has been, and will continue to be an effective measure in identifying higher-performing stations. These standards were developed collaboratively between BAR engineering and enforcement staff and have been validated through continued use since 2003. As a result, the SVFR meets the necessity standard of the APA.

AB 2289 mandated that BAR develop inspection-based performance standards that could be applied to both Test-Only and Test-and-Repair stations. This broad authority permitted BAR to develop standards necessary for the success of the STAR Program. As a result, the SVFR has been included in this proposed action to identify proper inspection behaviors for the purpose of certifying higher-performing stations.

As indicated in the ISOR, the SVFR is used to predict whether a station is failing vehicles at a reasonable rate when compared to inspection results for similar vehicles inspected at other stations statewide. Stations that pass vehicles that should fail, are clearly circumventing the Smog Check Program and its intended air pollution reductions. To address this issue, the SVFR is being established to measure if a station is properly inspecting vehicles. Stations and technicians who pass vehicles improperly will have failure rates below the statewide average. By setting the SVFR limit at a generous 75% of the statewide average BAR ensures that only the stations having a SVFR significantly below average will be excluded under this performance measure from participating in the STAR Program until the performance measure(s) are achieved. For example, if the statewide average for the similar vehicle failure rate was 40%, stations with a failure rate of less than 30% would not meet the performance measure, since 75% of the statewide average is 30% (40% x 75% = 30%).

Setting minimum qualifying standards is not a departure from current practice. For instance, in developing a licensing examination, a minimum passing score must be determined to ensure competency of licensees. This certification

standard is based on the same logic, and in fact is more reliable since it relies on actual data from Smog Check inspection results.

x. "3392.3.1(a)(3) – The requirement that a station maintain an Excessive Test Deviation Rate greater than one violates the authority, reference, clarity, and necessity standards of the APA. The rulemaking record provides no information suggesting that this standard relates to reduction of pollution, explaining what a score of 'more than one' means, or providing any basis for selecting this score as the standard, *[sic]*"

This comment/recommendation was accepted, in part, as follows:

BAR has determined that the text of this proposed section was initially drafted incorrectly. As a result, the text was amended in the first 15-day notice to add the word "no" before "more than one" as follows:

> *"The station shall have an Excessive Test Deviation Rate of no more than one in the most recently completed calendar quarter, as defined in Section 3340.1."*

This revision corrects the eligibility for the STAR Program as it related to the Excessive Test Deviation Rate (ETDR) by specifying the allowable ETDR, thereby satisfying the clarity standard of the APA. Overall, compliance with AB 2289 is the "authority" and "reference" of the inspection-based performance standards, of which the ETDR is one of the standards.

The ETDR examines how a Smog Check technician is performing a test. All Smog Check inspections should be performed in accordance with the Smog Check Inspection Procedures Manual and by following the inspection equipment test prompts. The inclusion of a performance standard that observes whether or not a technician is performing a certain aspect of the test is necessary because a deviation from these established standards would be a violation of BAR laws and regulation. BAR already has the authority to cite and fine technicians and stations that deviate from specified Smog Check inspection procedures, the exact standards that the SVFR is evaluating. As a result, the SVFR satisfies the necessity standard as it is already used by BAR for other purposes.

AB 2289 mandated that BAR develop inspection-based performance standards that could be applied to both Test-Only and Test-and-Repair stations. This broad authority permitted BAR to develop standards necessary for the success of the STAR Program. As a result, the ETDR has been included in this proposed action to identify proper inspection behaviors for the purpose of certifying higher-performing stations. As indicated in the ISOR, the ETDR is a short-term measure designed to identify a deviation only if there is a unanimous (90%) agreement within the industry that the vehicle

should receive a particular part of the inspection and the technician failed to perform the test.

Because existing laws and regulations prescribe proper test procedures designed to identify vehicles that should fail and receive repairs to reduce excessive emissions, any deviations of the categories specified for the ETDR is an indication that inspections are not being performed properly and, in turn, air quality is being compromised. However, the Bureau has no interest in implementing a program that is so stringent that it excludes many well-intentioned stations because of occasional mistakes. This would affect the Smog Check Program's ability to handle the directed vehicle inspection volume in this state.

As a condition of qualifying for the STAR Program, a Station can have no more than one deviation. Additionally, STAR Certified stations may have an ETDR of two, for two consecutive quarters. The station's STAR certification will not be invalidated until the station fails to meet the short-term measure for two consecutive quarters. At that point, the invalidation process as proposed in section 3392.6.1 could be initiated.

y. "3392.3.1(a)(5) – The provision that an applicant for certification as a STAR program stations 'cannot have received any citation' violates the APA necessity and consistency standards. The rulemaking record is devoid of any evidence that all citations that may be issued pursuant to Health and Safety Code section 44050 equally justify disqualification from eligibility for certification. For example, it treats a citation for an inadvertent paperwork violation as equal to a citation for willful violation of the testing standards. In order to satisfy the necessity standard the rulemaking record must demonstrate that any citation, however technical or inconsequential, justifies disqualification. The proposed section is inconsistent with statutory and constitutional due process laws since the mere issuance of a citation serves as the basis for disqualification. A person who receives a citation pursuant to section 44050 is entitled to a hearing. Only after there is an actual adjudication or final order pursuant to the citation has the person been definitively determined to have violated the law. By basing disqualification only upon the issuance of a citation the regulation imposes a penalty before a person is determined to be a wrongdoer. This violates due process rights."

This comment/recommendation was accepted as follows:

The bureau modified section 3392.3.1(a)(5) during both the first and second 15-day notice of modified text so that minor infractions, such as paperwork violations, would not constitute a cause for invalidating a STAR station's certification. Specifically, the proposed regulation narrowed the statutory and originally proposed regulatory code sections, so that only effective, non-

appealable citations that have issued as a result of an inadequate or improper inspection would be grounds for invalidating a STAR certification.

During the second 15-day notice BAR modified Section 3392.3.1(a)(5) to read as follows:

"A station cannot have received a citation which is final and non-appealable, nor can a station employ any licensed Smog Check technician who has received a citation which is final and non-appealable, within the preceding one-year period from the effective date of the citation for violations of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032, and 44060 of the Health and Safety Code; and sections 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."

AB 2289 provided BAR broad authority to develop inspection-based performance standards. Therefore, it is appropriate for BAR to use a licensees' "enforcement history" relating to inspection-based violations of the Health and Safety Code and corresponding regulations in determining STAR eligibility.

z. "3392.3.1(a)(8) – This section violates the clarity, and consistency standards of the APA. By saying that a person is disqualified for a license for having 'engaged in conduct that would be cause for discipline' the proposed regulation fails to give adequately specific notice to the regulated public regarding what conduct is permissible and what conduct is not. The proposal is inconsistent with statutory and constitutional due process guarantees because it would disqualify a person from certification without any protection of the person's rights. As written the regulation would permit BAR to reject an application for certification with no other explanation that 'the applicant has engaged in conduct that would be the cause for discipline' without any basis for an appeal by the applicant or even any right for the applicant to obtain explanation of the decision."

This comment/recommendation was accepted as follows:

The bureau removed the following from its proposed regulation; "The station or technician may not have engaged in any conduct that would be cause for discipline with respect to the station's Automotive Repair Dealer registration or Smog Check station license." This modification was included in the first 15-day notice. BAR determined that this provision, even though a similar

provision exists in CCR section 3392.3(a)(7) of the current Gold Shield Program regulations, is overly broad and excessive.

aa. "3392.5.1(a)(1) – This provision violates the clarity and consistency standards based upon the same deficiencies described in the previous paragraph regarding section 3392.3.1(a)(8)."

This comment/recommendation was accepted as follows:

The bureau removed the following text from its proposed regulation: "The STAR station's Automotive Repair Dealer registration, Smog Check station license, or the license of any technician employed by the station, is disciplined by the bureau in any form or manner." This modification was included in the first 15-day notice. BAR determined that this language, even though similar language exists in section 3392.5 of the current Gold Shield Program regulations, is overly broad and excessive.

bb. "3392.5.1(a)(5) – The regulation violates the necessity standard. There is no evidence in the rulemaking record demonstrating the necessity for prohibiting the employment of a technician whose FPR score is less than 0.1."

This comment/recommendation was rejected because:

It is important to note that proposed CCR section 3392.5.1(a)(5) does not prohibit employment of a technician based on an FPR score of less than 0.1. Furthermore, technicians that perform proper inspections, in accordance with current laws and regulations, would not have an FPR score of less than 0.1. As scores approach zero, BAR's confidence that the station is performing below average increases. A score of zero means BAR is 100% confident that the station performance is below average.

A technician with a FPR score of less than 0.1 would be restricted from performing Smog Check inspections and emission-related repairs associated with a Smog Check inspection failure. Depending on the station license classification, technicians could continue to perform emissions-related repairs (except for repairs directly associated with a Smog Check inspection failure), tire repairs, changing tires, lubricating vehicles, installing light bulbs, batteries, windshield wiper blades and other minor accessories, cleaning, and replacing spark plugs, replacing fan belts, oil, and air filters.

In addition, participation in the STAR Program is voluntary for both stations and technicians. The STAR Program design is similar to the existing Gold Shield Program, which is also voluntary. While some stations participate in the Gold Shield Program, others do not. This voluntary option represents a business decision for Smog Check stations and technicians.

The Sierra Research, Inc. report "Evaluation of the California Smog Check Program Using Random Roadside Data," which was prepared for the California Air Resources Board and the Bureau of Automotive Repair, analyzed data specifically related to a station performance program.

The Sierra Research, Inc. report calculates emissions benefits using two different performance scenarios. The first defines low performance as stations having a performance score of less than 0.1, while high performance is a score above 0.9. In the second scenario, low performance is detailed as a score below 0.02, while high performance as a score above 0.975. The report goes on to state that a high performing network of stations with scores above 0.9 would generate an emissions benefit of 51.9 tons per day (TPD) reactive organic gases (ROG) + Nitrogen Oxide (NOx) over the current Smog Check Program, while a network comprised of stations with scores above 0.975 would generate a benefit of 69.5 TPD ROG + NOx.

Rather than take the approach of selecting only a narrow band of top performers, BAR instead has taken the approach of eliminating the worst stations with the belief that this will drive overall performance up and create a sustainable program. As shown in figure 5-1 of the Sierra Research, Inc. report, the approach of eliminating FPR performance below 0.1 will yield significant dividends toward addressing the high re-failure rate also reported in that study.

BAR relied on the expert opinion provided in Sierra Research, Inc. report as the basis for refining its current performance standards. Even though CETIA may not agree that BAR selected the best option to meet the provisions of AB 2289, it does not mean that BAR failed to satisfy the necessity standard of APA.

2. *The following comment was received from Mike Cavanah of the Select 21 Corporation dba Simply Smog Test Only Centers.*

   a. **"Similar Vehicle Failure Rate: How is this calculated? We are in an upper class area and our failure rate is not very high (10% to 12%). Not only do our customers service their vehicles regularly, we also do all the smog testing for the local BMW, Lexus and Mercedes Benz dealers. Rarely do their cars fail as they are all late model. Some are only a year or two old as they buy them out of state. How can we be compared to a station in East Los Angles or WATTS?"**

   This comment/recommendation was rejected because:

The Similar Vehicle Failure Rate (SVFR) compares the initial test failure rate for vehicles inspected at each station to the initial test failure rate for "similar vehicles" statewide. An initial test may be an official inspection or a pretest and is the first test performed on a vehicle in its current inspection cycle, which may be for biennial inspection, change of ownership, or initial registration. The revised definition of "Similar vehicles" was modified in the second 15-day notice of modified text and means vehicles with the same VLT Row ID, or at a minimum, vehicles with the same model year, make, and engine displacement. Additional factors such as time since last certification, previous initial test result, and odometer readings are also used in developing a SVFR.

The standard for this performance measure is not met if the overall rate that vehicles fail their initial test at a station is less than 75% of the statewide average for similar vehicles. In other words, the overall failure rate must be well below average in order for a station not to meet the SVFR. This performance measure is calculated every month based on data from the three most recent months. However, STAR eligibility for this performance measure is based only on the scores calculated at the end of each calendar quarter.

b. "Will anyone with a scan tool and 4 walls be able to test OBD II vehicles? How can we compete with someone without a dyno, which we must have for directed vehicles? It would seem logical that if anyone can do the test you will be putting the dyno equipped shops out of business, which would put a tremendous burden on the public who fall into directed fleet category."

This comment/recommendation was rejected because:

This question is outside the scope of this proposed regulation. This regulation only describes the STAR Program and specifies inspection-based performance standards that stations will be evaluated on. A separate regulatory package concerning inspection equipment and procedures for OBD II-focused inspections will identify any impact on the Smog Check industry and consumers.

c. "The Follow-Up Pass Rate Score: How is this calculated? How can we be held responsible for how a consumer takes care of their cars for two year's after we have tested it? There are many things that could have gone wrong with a vehicle in that two year period that we have no control over. The BAR has failed to present an actual example of how this would work and show material evidence that the variance in FPR score can only be attributable to poor testing procedures by the prior technician."

This comment/recommendation was rejected because:

The Follow-up Pass Rate is a long-term STAR performance measure that evaluates the performance of both stations and technicians. It is the only performance measure that evaluates the performance of a technician to determine a station's eligibility for the STAR Program. For this reason, FPR scores are given to both Smog Check stations and technicians.

The FPR performance measure examines whether vehicles certified by stations and technicians in their previous inspection cycle are passing their current initial inspection at a higher or lower rate than expected for "similar vehicles." Station FPR scores reflect the performance of the station as a whole at the time the vehicles were previously certified. Technician FPR scores reflect the performance of the individual technician at the time they last certified the vehicle, regardless of the station at which the technician worked when he/she previously certified the vehicle. Smog Check inspection performance during the previous inspection cycle is measured by comparing, in the current cycle, the actual failure rate on initial tests to the expected failure rate for similar vehicles statewide. An initial inspection may be an official inspection or a pretest and is the first test performed on a vehicle in its current inspection cycle, which may be for biennial inspection, change of ownership, or initial registration. Previously certified vehicles passing at a higher rate than similar vehicles in the current inspection cycle is an indicator of better Smog Check inspection performance in the previous inspection cycle.

To better understand how this performance measure works, consider the following conceptual example. Two-hundred 1995 Ford Mustangs, with 5.0 liter engines, were gross-polluting at the start of their previous inspection cycle. Half of these vehicles were tested improperly and certified to get the vehicles to pass without the necessary emissions repairs. The other half were tested properly, which resulted in the vehicle failing the initial inspection, then the vehicle received the appropriate repairs, and subsequently passed the follow-up inspection.

Vehicles that improperly pass an inspection and do not receive repairs subsequent to their last inspection will continue to be high-polluting in their current inspection cycle. Some of the vehicles that were properly inspected, repaired, and certified in the previous inspection cycle may fall into disrepair by the time of their next inspection cycle. However, the majority of vehicles which receive proper repairs will have comparatively lower emissions levels when inspected in the next inspection cycle. As a result, vehicles that were properly inspected, repaired, and certified will fail at a much lower rate in their next inspection cycle as compared to vehicles that were improperly passed.

FPR scores range from zero to one. A score of zero means that BAR is 100% confident that the performance at a station or by a technician is below the

statewide average in comparison to other stations or technicians. In other words, that station or technician is, for the most part, not performing proper inspections. While a score of one means BAR is 100% confident that the performance at a station or by a technician is above the statewide average. In other words, that station or technician is, for the most part, performing proper inspections. FPR scores are calculated twice a year, on July 1 and January 1.

Since the FPR performance measure examines whether vehicles certified in their previous inspection cycle are passing their current inspection at a higher or lower rate than expected, newly licensed stations and technicians will initially not have an FPR score. FPR scores for new stations and technicians can be produced once the vehicles they have certified are tested in their next inspection cycle. Similarly, stations and technicians with extremely low test volumes cannot be evaluated on the FPR because there is insufficient data to form a statistically valid assessment of their performance. In cases where an FPR score cannot be assessed, no FPR score will be issued.

Because the FPR simply compares the failure rate of a station and technician in the current inspection cycle to the expected failure rate for similar vehicles in the same inspection cycle, a number of different inspection-related behaviors can affect one's FPR score. In short, any behavior that helps a vehicle pass an inspection when the vehicle should otherwise fail the inspection will tend to lower the FPR score of a station and/or technician.

Specific behaviors that affect a station's or technician's FPR score include:

1. Clean piping (i.e., passing a vehicle that is out of compliance with the tailpipe emissions standards by introducing a substitute clean exhaust sample through the emissions analyzer)
2. Clean plugging (i.e., using a substitute source of OBD II data for a failing vehicle's OBD II self-diagnostic test)
3. Shifting vehicles into the wrong gear during an ASM test
4. Over-conditioning vehicles (i.e., racing the engine to get a vehicle's catalytic converter hotter than would happen under normal operating conditions)
5. Not identifying visual inspection failures
6. Not identifying functional inspection failures (e.g., fuel cap, ignition timing, low-pressure fuel evaporative emissions)
7. Entering incorrect vehicle parameters to generate more lenient emission standards or a lighter vehicle weight loading (in order to create less treadmill resistance) during an ASM test

Stations and technicians with low FPR scores can improve their performance by performing accurate inspections appropriate to the vehicle being inspected according to the Smog Check Inspection Procedures Manual.

Technicians who have a FPR score of .4 or higher can work at or be hired by any station, including a STAR Certified station. Stations with a FPR score of .4 or higher may continue to employ or hire new technicians without an FPR score. For the STAR Program, continued employment or hiring of a technician means for the purpose of performing Smog Check inspections and/or repairs.

Stations with FPR scores greater than or equal to 0.1 but less than 0.4 are not eligible to apply to the STAR Program if they currently employ any technician with a FPR score of 0.1 to 0.4. STAR Certified stations may continue to employ a technician who gets a FPR score of 0.1 to 0.4 while employed at that station. However, STAR Certified stations hiring a new technician with a FPR score of 0.1 to 0.4 may be grounds for invalidation of the station's STAR certification.

STAR Certified stations employing a technician who gets a FPR score of less than 0.1, or hiring a new technician with a FPR score of less than 0.1, may be subject to invalidation of the station's STAR certification. In addition, STAR Certified stations obtaining a FPR score of less than 0.1 and either employing a technician or hiring a new technician without an FPR score may be subject to invalidation of their station STAR certification.

d. "STAR is not a voluntary program for existing Test-only Stations. It is a new requirement to remain in business in the station type created by the legislature in BAR 97. Test-only stations will not be economically viable without STAR certification. The economic impact on business states that there is no impact since the program is voluntary. At least 1000 test-only shops will be prohibited from participating the STAR program, thereby being rendered economically not viable. At a minimum that would translate into 1000 business closings and the elimination of 2500 technicians. There is a real economic impact of STAR that will have a ripple effect through local economies."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment; reference section I., subsection 1., paragraph p.

The STAR Program is structured to direct the vehicles most likely to fail their Smog Check inspection to the stations performing more accurate inspections. By design, stations and technicians that choose not to perform accurate Smog Check inspections will be negatively impacted, and the stations and technicians who perform accurate inspections will be rewarded for their efforts. This redistribution of the inspection volume will not affect the earnings of the industry as a whole. The same number of vehicles will need to be inspected after the implementation of the STAR Program.

By releasing STAR performance scores well in advance of the implementation of the Program, stations and technicians will have the opportunity to improve their performance, if necessary, so they may participate in the STAR Program. Stations may choose, as a business decision, not to participate in the STAR Program.

e. "The intent of AB 2289 was to increase emissions reductions by granting BAR expanded authority. The STAR program does not conform to that intent. A business could potentially lose it's rating for a minor infraction such as an error on a sign or invoice. The intent of AB 2289 was for shops negatively impacting emissions reductions to lose their rating. How are minor non environmental errors a reasonable standard for shops to lose their businesses over?"

This comment/recommendation was rejected because:

This comment is substantially similar to another comment; reference section I., subsection 1., paragraph y.

f. "The test deviations can occur for reasons other than bad behavior by technicians. The BAR has shown no data to correlate test-deviations to poorly performed Smog tests."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment; reference section I., subsection 1., paragraph k.

g. "We have lots of vehicles in our shop, usually older, that are right on the bubble in one or more category of the ASM test at both speeds. These could fail the very next day if they had waited to be tested. How is this going to affect our FPR and why aren't these older (1976-1999) vehicles being tested yearly?

I know your aim is to improve the state smog check system, but it is very disturbing to not know exactly what we are up against."

This comment/recommendation was rejected because:

Stations located in geographic areas of the state where their clientele tends to own older, higher mileage vehicles will not be penalized. This is because the results for each vehicle inspected by each station or technician will be compared to results from similar vehicles inspected throughout the state with similar time intervals between inspections.

Comments concerning yearly Smog Check inspections are outside the scope of this proposed regulatory action. The proposed regulation only specifies what inspection-based performance standards stations will need to meet in order to test vehicles pursuant to Health and Safety Code sections 44010.5 and 44014.7, or vehicles identified by BAR as gross-polluters.

3. *The following comment was received from John Devin, Smog Station Owners.*

   a. **"The Bureau of Automotive Repair's new STAR metric software comprehensively and objectively evaluates the performance and compliance of California's 7,000+ smog check stations and 11,000+ smog check technicians.**

      Higher-performing stations and technicians are then able to qualify and certify as STAR stations and STAR technicians. By doing so they earn the right to test and certify directed vehicles, as well as participate in the Bureau's publically funded consumer assisted program (CAP).

      With the improvements recommended in the following 2 pages, the Bureau's new STAR metric contains the necessary incentives to produce phenomenal improvements to smog check performance and compliance over time.

      Without the recommended improvements however, STAR incentives are compromised, and smog check performance and compliance will remain elusive.

      The Bureau's current regulatory submittal contains a mechanism ('Enforcement History'), whereby the positive incentives of STAR can be arbitrarily overruled.

      A citation = 12 month STAR ban.
      A civil judgment = 36 month STAR ban.
      An administrative action = 36 month STAR ban.

      Technicians who lose their STAR certification will likely lose their jobs and earning power. Test-only stations that lose their STAR certification will likely lose their businesses (because STAR = directed vehicles. Currently, on average, 45 percent of the test-only station revenue consists of directed vehicles."

   This comment/recommendation was rejected because:

   Technicians are not certified as part of the STAR Program – only stations are. As a result, technicians do not have a STAR certification to lose.

AB 2289 specifically mandates BAR to develop, through regulation, inspection-based performance standards that stations and technicians are required to meet in order to test vehicles pursuant to H&S 44010.5 and 44014.7, or vehicles identified as gross polluters. The proposed regulatory action creates the STAR Program to satisfy this mandate.

BAR's proposed regulations do not prohibit employment or eliminate business statewide, rather, it relies on inspection-based performance standards to act as incentive for stations to gain the privilege to test likely high-polluting vehicles. Stations and technicians that do not qualify for the STAR Program can continue to inspect non-directed vehicles and vehicles undergoing a change of ownership inspection. Depending on license classification, stations and technicians can continue to perform repairs (excluding those stemming from a failed Smog Check inspection), tire repairs, changing tires, lubricating vehicles, installing light bulbs, batteries, windshield wiper blades and other minor accessories, cleaning, and replacing spark plugs, replacing fan belts, oil, and air filters.

b. "Citations: The Bureau can randomly and arbitrarily run an undercover vehicle with any type of anomaly to any STAR qualified station. If the anomaly is not noticed it results in a 12 month STAR ban on the high-performing station and technician."

This comment/recommendation was rejected because:

This proposed regulatory action's policy toward citations is a continuation of the policy currently used with the Gold Shield Program. The one major difference between the STAR Program and the current Gold Shield Program is that minor citations such as minor paperwork violations will not be used to determine STAR eligibility. Smog Check stations and technicians can easily meet the citation requirements by simply performing accurate Smog Check inspections.

c. "Civil judgments: Anyone can file a small claims case against any STAR qualified station for virtually any reason (related to their duties as an ARD), and if any part of the complaint is upheld by the court, no matter how small or insignificant, it results in a 36 month STAR ban on the high-performing station."

This comment/recommendation was rejected because:

As indicated in the proposed regulation text, judgments from small claims matters are explicitly excluded from determining STAR eligibility.

d. "Administrative actions: Admin court cases will be adversely affected because STAR certified stations and technicians will not be likely to agree

to any stipulated settlement or probation since doing so would result in a 36 month STAR ban. Virtually every case will *[sic]* go all the way through to hearing and appeal."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment; reference section I., 1., q.

e. "There is also an Ex Post Facto legal problem in relation to past admin cases which completed prior to the final approval of the new regulations but will extend past the startup of the new STAR program. Stations and technicians cannot legally be retroactively subjected to new and severe financial penalties (STAR ban), that did not exist when their cases were completed."

This comment/recommendation was rejected because:

The proposed regulatory action does not seek to subject stations and technicians to new financial penalties that did not exist when their previously adjudicated cases were closed. The STAR Program sets qualifying standards that stations must meet in order to participate in the voluntary program. Consideration of past actions represents a disability towards certification, not further punishment for the acts that led to the discipline.

The proposed regulatory action is consistent with the existing Gold Shield Program with respect to the handling of past administrative cases.

f. "In light of all of the above, we respectfully ask the Bureau to amend their regulatory proposal to exclude 'Enforcement History' from their STAR certification standards."

This comment/recommendation was rejected because:

AB 2289 mandates that directed vehicles and vehicles identified as gross-polluting vehicles must be inspected by select stations that meet inspection-based standards. Based upon the findings of the Sierra Research, Inc. report, which was the impetus behind AB 2289, many of the existing stations are not performing inspections in compliance with established laws and regulations.

The same report established the relationship between station performance, as measured during random roadside inspections and the "Station Performance Algorithm," which was subsequently renamed as the Follow-up Pass Rate, or FPR.

There is nothing in the regulatory process that precludes the use of a long-term metrics in evaluating stations as part of the STAR Program. Though the commenter disagrees with use of long-term performance measures for the STAR Program, this does not mean that the FPR is an ineffective performance measure.

g. "There is one component of the Bureau's otherwise excellent STAR metric, namely Follow-Up Pass Rate (FPR), which is inherently flawed, as follows.

FPR scores a single aspect of each technician's performance using data from the previous inspection cycle (primarily data that is 2 years old and older). Even though a technician's performance may have significantly improved since them, FPR is deficient in seeing or scoring that improvement until a minimum of 2 more years has passed."

This comment/recommendation was rejected because:

Changes to station and technician behavior take a while to be reflected in their FPR scores; however, they are an effective measure of overall station and technician inspection performance. BAR staff has determined, through analysis and expert opinion provided in the Sierra Research, Inc. report "Evaluation of the California Smog Check Program Using Random Roadside Data," that the FPR is necessary in order to ensure stations and technicians do not improperly certify vehicles selected for testing pursuant to H&S 44010.5 and 44014.7, or vehicles identified by BAR as gross polluters.

h. "FPR is based on the false assumption that technicians are the lone factor in determining the performance and compliance of stations. FPR ignores the stations themselves, their ownership and management, as determining factors. FPR also ignores the strong role that stations play in determining the performance and compliance of technicians."

This comment/recommendation was rejected because:

Though the commenter disagrees with application of the FPR, this disagreement does not mean that the FPR is not necessary to effectuate the intent of AB 2289.

Further, the FPR has both station and technician performance elements. As the commenter points out, station ownership and management bear some responsibility for the quality of inspections performed in each station. For this reason, the proposed regulatory action precludes stations with low FPR scores that seek to earn or maintain STAR certification from employing technicians who have not yet earned an FPR score. This will help to ensure that stations

with a track record of low performance are not influencing the behavior of new technicians.

At the same time, technicians are ultimately the ones performing the inspection. For this reason, it is reasonable that they bear the burden of their own behavior. At the same time, performing proper inspections will allow technicians to better market themselves to prospective employers. This is especially true considering stations owners seeking to earn or maintain STAR certification may not employ technicians who have low FPR scores.

i. "FPR contains inherent bias and will be subject to 'gaming'. VID data shows that when motorists receive their DMV smog check mailer they usually go back to the same station that passed their vehicle two years prior. This means that very often the same technicians test the same vehicles again. FPR creates a very strong bias to pass the same vehicles again because failing them would negatively impact the technician's FPR scores."

This comment/recommendation was rejected because:

While some vehicles return to the same station where they were last certified, many still do not. Still, the FPR is corrected for the likelihood that the station performing the follow-up inspection will fail the next vehicle. As part of the process, each vehicle is assigned an expected failure rate based upon factors such as model year, make, model, engine, number of miles on the vehicle, etc. Those expected failure rates are then adjusted for the station that performs the follow-up inspection. So, if a station passes most of the vehicles it inspects in order to look good on the FPR, it will result in the expected failure rates for vehicles inspected at that station being adjusted. As such, the basis by which the station is evaluated is ever changing, thus making it difficult to game.

Additionally, the Similar Vehicle Failure Rate poses an opposite pressure on technicians who purposefully attempt to deceive the FPR. As a result, if a station artificially passes too many vehicles, the station will not be able to participate in the STAR Program.

As stated by BAR at over 20 statewide workshops, the best way for stations to perform well on the proposed STAR performance measures is for the stations and technicians to perform proper inspections in accordance with the inspection equipment test prompts and the Smog Check Inspection Procedures Manual.

j. "FPR will inhibit technicians who might otherwise want to change their behavior for the better. For example, two years ago a technician passed lots of vehicles that should have failed, now he would like to properly fail those same vehicles, but doing so would negatively affect his FPR score.

In light of all of the above, we respectfully ask the Bureau to amend their regulatory proposal to exclude 'Follow-Up Pass Rate' from their STAR certification standards."

This comment/recommendation was rejected because:

This will be an issue stations and technicians who have been performing fraudulent and low-quality inspections may have to confront. Still, stations and technicians are going to be given their STAR performance scores well in advance of the implementation of the STAR Program. Essentially, stations and technicians are being given a grace period in which to improve their scores without the effect discussed by the commenter.

4. *The following comment was received from Dennis Montalbano, Automotive Service Councils of California.*

   a. **"The Automotive Service Councils of California (ASCCA) is a statewide organization that represents thousands of Automotive Service Professionals including licensed smog check stations (TO's, T&R's, and GS's).We are writing to provide general comments and observations of the new STAR program and suggestions to improve the proposed regulations.**

   First, ASCCA takes exception to the Notice of Proposed Regulatory action (page 17), which states that there are no costs associated with becoming STAR-certified. This is not accurate. Smog facilities will need to train technicians and be required to purchase new OBD II-only equipment. It also states that there will be no loss of jobs or business. Once the STAR program is up and running, it is anticipated that many technicians will lose jobs and smog facilities will not participate in the program due to program costs and requirements."

   This comment/recommendation was rejected because:

   OBD II focused inspections are not part of the proposed STAR Program, even though both were permitted by AB 2289. As such, comments regarding OBD II focused inspections are not germane to this regulatory package.

   b. **"Furthermore, ASCCA is not convinced that once the STAR program is up and running, there will be adequate numbers of directed vehicles that require tailpipe testing via the BAR 97 machine in order to pay for the new or existing equipment, building leases, or equipment maintenance plans. Pay for a STAR technician (recent data shows that these STAR technicians will command much more in wages once BAR posts their grades for interested parties to see); other costs associated with becoming**

a STAR Test and Repair Station include a BAR 97 Machine, Evap Tester, and the new tester (OBD II only) to participate in Cal-VIS."

This comment/recommendation was rejected because:

The STAR Program does not affect the number of vehicles directed for testing. Discussions regarding proposed inspection equipment are not germane to this regulatory package as it only deals with establishing inspection-based performance standards.

BAR expects that technicians who perform better on the STAR performance measures will command higher market value than lower performing technicians at STAR Certified stations. Upon implementing the STAR Program technicians will have a strong incentive to perform proper inspections.

The other costs mentioned for becoming a STAR Test-and-Repair station are current costs and represent a business decision. Nothing in the proposed action requires station to become registered as a Test-and-Repair station.

c. **"AB 2289 specifically addresses OBD Only Testing. The 2013 Smog program also relies on ASM testing. ASCCA believes that smog facilities could be harmed because of the projected low numbers of tailpipe tested vehicles that will need testing, and the subsequent low volume of vehicles that need an ASM testing will not cover existing machines costs such as maintenance, repairs, technician salaries and other costs associated with owning an ASM Tester, Dyno, and Low Fuel Emissions tester that is required. ASCCA requests that the BAR create and provide easy-to-understand information and data which show that over a period of time, tail pipe testing will continue to decrease."**

This comment/recommendation was rejected because:

OBD II focused inspections are not part of the STAR Program, even though both were supported by AB 2289. As such, comments regarding OBD II focused inspections are not germane to this regulatory package.

d. **"ASCCA also has the following specific comments and suggestions with regard to the text of the regulations:**

Section 3340.1 Definitions. 'Excessive Test Deviation Rate', Paragraph (7) passing OBD II systems with the maximum number of unset readiness monitors allowed.

This standard needs to be refined further, and possibly applied only to 1996 to 2000 model year OBD II vehicles, which have a maximum allowable unset monitor, count of 2.

If this standard is applied to 2001 and later OBD II vehicles requiring a maximum of only 1 unset monitor, vehicles which require multiple drive-cycles, extended cool down time between drive cycles or overnight rest periods for EVAP monitor OBD II self-test will either require a second visit or 2-day stay for a smog check. This would be necessary to protect the station from receiving a poor STAR rating. Although one failed area of standards may be allowed under the proposed ratings, an 'automatic' failed rating standard such as this might combine with other anomalous failures to cause 2 failures and a low STAR score. A possible solution is to eliminate the need for the EVAP monitor to run unless there is an actual EVAP repair necessary, but all others must or this would create a deviation flag on 2001 and later test vehicles."

This comment/recommendation was rejected because:

The maximum unset test deviation rate measure only considers excessive unset monitor rates for vehicles during their initial test for each inspection cycle. For this reason, the additional measures discussed by the commenter (e.g., multiple drive cycles, etc.) are not required because the monitors would already be set. A Smog Check technician should only reset a vehicle's OBD II computer after emissions-related repairs have been performed. Such repairs should occur after the initial vehicle inspection, thus do not impact this performance measure.

Naturally occurring reasons for unset readiness monitors, such as a car having a battery that was recently replaced, will tend to be evenly distributed across large samples of similar vehicle data. With this being the case, testing techniques caused by differences in station inspection behavior will become evident. Specifically, stations that actively reset OBD II systems prior to inspections in an attempt to mask OBD II-identified problems will be recognized and trigger a deviation.

e. <u>"Section 3340.1 Definitions. 'Follow-up Pass Rate (FPR).'</u>

This standard is too broad and does not allow for normal breakdown events that take place as vehicles age and components wear. Simple actions such as putting in lower grade fuel can cause emission components to degrade, resulting in a failed emission test. This is happening more frequently due to the rising cost of fuel. A possible solution is to have a deviation raised only for a vehicle that fails the next Emission test due to the same reason as the previous failed inspection."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please reference BAR's response in section I. subsection 1., paragraph c. and the response below.

The majority of vehicles inspected in the Smog Check Program pass their initial inspection. According to the Sierra Research, Inc. report, approximately 17% of the 1976-99 model year vehicles studied were estimated to be in a failing condition at the time they were certified. The methodology proposed by the commenter would not identify stations that falsely passed vehicles during an initial inspection because there would not have been a failing result to which a future Smog Check failure could be compared.

With respect to the "normal breakdown events" discussed by the commenter, BAR acknowledges that factors other than improperly performed test procedures can contribute to a vehicles ability to pass and/or fail a Smog Check inspection. For this reason, predicting the behavior of individual stations based upon a small sample of vehicles would be problematic; anomalies could drive the results. When larger sample sizes are considered, "normal breakdown events" such as those described above, do not create substantial bias in the data. This is especially true since the analyses used by the STAR performance measures are corrected based upon similar vehicles. "Similar vehicles" are vehicles with same VLT Row ID, or at a minimum, vehicles with the same model-year, make, and engine displacement. When these factors are considered over large data samples, systematic behavioral trends on the part of stations emerge, thus allowing BAR to accurately identify, with a great deal of certainty, stations and technicians influencing Smog Check inspections through improper behavior.

f. <u>"Section 3392.3.1 Eligibility for STAR Certification; Paragraph (5).</u>

Receiving a citation, no matter how serious, would make a smog facility ineligible for STAR certification for at least one year. This requirement is too harsh and out of line for a smog facility that simply makes an unintentional paper work mistake or error. BAR should be able to distinguish and separate serious citations from the unintentional paperwork citations."

This comment/recommendation was accepted as follows:

The Bureau has modified CCR section 3392.3.1(a)(5) to ensure that only violations relating to Smog Check inspections will be used to determine eligibility for the STAR Program. *(Emphasis added.)* This change is

consistent with AB 2289 in allowing for inspection-based performance standards.

In regards to citations, BAR always intended to use the effective date of a citation as the basis for determining eligibility for the STAR Program. However, to avoid any confusion, BAR revised a station's eligibility so it would be based on citations that are considered final and non-appealable. This revision provides persons directly affected by this proposal additional specificity as to when a citation may be used in determining STAR eligibility.

> *"A station cannot have received a citation which is final and non-appealable, nor can a station employ a licensed Smog Check technician who has received a citation which is final and non-appealable, within the preceding one-year period from the effective date of the citation for violation of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032 of the Health and Safety Code; and 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."*

g. <u>"Section 3392.3.1 Eligibility for STAR Certification; Paragraph (11).</u>

Requiring smog facilities to have physical possession of manuals and publications in this electronic and computer age is not necessary. This requirement should be amended to allow facilities to maintain and be allowed to have electronic access to all required manuals and publications."

This comment/recommendation was accepted as follows:

BAR has amended the proposed regulations to allow for electronic access to required manuals and publications.

> *"Physical possession of, and/or electronic access to, all required manuals and publications."*

h. <u>"Section 3392.5.1 Causes for Invalidation of STAR Station Certification; Paragraph (3).</u>

Invalidating a STAR station's certificate for discipline by the Bureau, *'in any form or manner'* is too broad. This could include educational 'Write it Right' programs or office conferences. Education, training and information type situations with the BAR should not be cause for a station to lose its STAR certification. ASCCA recommends that the phrase 'in any form or manner' be deleted from paragraph 3 of this section."

This comment/recommendation was accepted as follows:

BAR amended the proposed regulations during the first 15-day notice of modified text to be more specific with regard to which disciplinary actions will be considered for STAR certification.

"The station owner, manager, licensed Smog Check technicians, or any other employee of the station, may not have been convicted of a crime within the preceding three-year period that is substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician. The station owner, manager, licensed Smog Check technicians, or any other employees of the station, may not have been found liable in a civil proceeding, excluding small claims matters, for acts or omissions that are substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician. The station owner, manager, licensed Smog Check technicians, or any other employees of the station may not be serving a probationary period as a result of a criminal or civil proceeding substantially related to the duties of an Automotive Repair Dealer, a licensed Smog Check station, or a licensed Smog Check technician."

5. *The following comment was received during the South El Monte regulations hearing on June 10, 2011 from* Greg Boesche, Quick Smog Inc.

   a. **"Thank you. Well first of all I'm from *Quick Smog Inc.* 621 West Whittier Blvd. City of La Habra. I am the owner and also the technician for a test only center. We do all the registrations, renewals and all that stuff right there at the office as well. As a Test-Only center speaking I just have an issue with three of the similarities in section seven as specific language proposed regulations talking about FPR-SVFR meaning Follow-up Pass Rate (FPR) in Similar Vehicle Failure Rate (SVFR). I believe it is Follow-up Pass Rate is based on the evaluation of recent pass rates for those same vehicles in comparison to the pass rate for similar vehicles inspected throughout the state. As well as Similar Vehicle Failure Rate in comparison of the initial test failure rate of an individual station to the initial test failure rate for the similar vehicle inspected statewide. As a Test-Only center, my only question is that we aren't really supposed to really be inspecting monitors before the test. So I just don't see how we can be penalized for something like this, if we are not repairing the vehicles. As well as the test deviation which is the station performs an initial inspection of the vehicle with the maximum allowable number of ODB II readiness monitors. So they all kind of three go hand and hand to me. So I just had a question on that part of it. I believe it goes into exceeds 125% of statewide average."**

This comment/recommendation was rejected because:

While seemingly similar in nature, the Similar Vehicle Failure Rate (SVFR) and Follow-up Pass Rate (FPR) rely on differing amounts of elapsed time; as such they communicate different information to BAR regarding Smog Check station behavior. The SVFR reports current results based upon who inspected the vehicle today. The FPR reports current results based upon who certified the vehicle previously. The SVFR tells us if stations appear to be failing too few vehicles in the current inspection cycle based upon similar vehicle results statewide. The FPR tells us if stations appear to have been previously passing vehicles that should have failed in the previous inspection cycle. The SVFR, returns results more quickly as information from prior inspections is not considered. If a station underperforms on the SVFR, they can simply fail more vehicles on the initial inspection and then fraudulently pass them in the next test and improve their score. The FPR, on the other hand, takes longer to accumulate or affect a score and is far less subject to manipulation because the results for each station or technician are based upon post-certification results, many of which do not occur at the station that originally certified the vehicle. If a station did an improper inspection on a vehicle in the last inspection cycle, they often cannot influence the outcome of its next inspection. Thus, the measure is much more robust.

With regard to the OBD II max unset readiness monitors deviation, the proposed regulations were designed to identify stations that routinely reset vehicle computers in order to get a vehicle that should fail an inspection, due to the vehicle failing its OBD II self-diagnostic test, to pass instead. The limits have been established so that a relatively few stations with abnormally high rates for the maximum unset readiness monitors would be flagged for deviations.

That being said, if a Smog Check station caters to a certain clientele, such as a dishonest used car dealer that resets computers in order to dupe unsuspecting car shoppers into purchasing malfunctioning vehicles, then the station needs to address the situation so they are not a party to this practice. A systematic process of resetting computers can affect a STAR score, whether the resetting is performed by the station or the dealership which brings the vehicle in for inspection. In such cases, BAR recommends that the station has a frank discussion with the dealership in order to let them know that this behavior will not be tolerated. If all STAR stations were to hold this line, as we are compelling them to do, then the dealership will be forced to make necessary repairs to malfunctioning vehicles prior to getting the vehicles certified for sale in California. By doing this, stations can both earn and maintain STAR certification, protect consumers, and ensure that high-emitting vehicles are not certified in the Smog Check Program.

6. *The following comment was received during the South El Monte regulations hearing on June 10, 2011 from Craig Johnson, Craig Johnson Automotive and representing ASCCA.*

   a. **"And first off I'd like to state that on page seventeen of the old Regulatory Action it states that there will be no costs associated with becoming STAR Certified. And we believe this not to be accurate. We think that there's going to be additional training involved once the program starts for technicians training that they'll have to pay for or the shop will have to pay for. We believe that they're going to have to buy a new OBD II only tester to participate in the CAL-VIS program."**

   This comment/recommendation was rejected because:

   This comment is not germane to the proposed regulation. This regulation only creates performance standards that stations and technicians will need to meet if they choose to inspect vehicles pursuant to H&S section 44010.5 and 44014.7, and vehicles identified by BAR as gross-polluting. This package does not create any additional inspection procedures or require any additional Smog Check inspection equipment.

   b. **"We anticipate that many technicians will lose their jobs due to the STAR performance rating. And it will have an economic impact on certain shops. So we just take exception to the statement that there's no cost associated whatsoever with becoming STAR Certified. Either by technicians' standards or stations' standards."**

   This comment/recommendation was rejected because:

   This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 1., paragraph p.

   c. **"Also, once the STAR program is up and running, we have a concern that there's going to be enough *[sic]* vehicles to maintain correct stations that do tailpipe testing, we have a concern that as Vehicle Retirement happens, VRRRM, CAP programs and such. And then at the same time the CAL-VIS program starts. And many people will possibly take their vehicles to some local fast merchandisers, places like oil change places that participate in the new CAL-VIS program. It will take away cars from people that do complete smogs or tailpipe testing. And so I believe the stations that do tailpipe testing need to have a certain amount of vehicles per day to pay for their being in business. And again we believe that the program will be diluted once CAL-VIS starts. And we're concerned that then the program could actually be in jeopardy because as stations dropout that don't have enough business, possibly they might**

have to drive too far to get smog checks, so that's a concern of ours. Some of the items that under the new program we're going to have a BAR97 machine which is already required, EVAP test which is already required, and then the new CAL-VIS tester just to participate in tailpipe testing. Maybe at a later date you can confirm with me people that participate in CAL-VIS only, how different cars are directed, because I feel that needs to be clarified again, for the people who made the investment in all the equipment. I believe that the department needs to be fair to those people that have invested all this equipment time to support that machine. We're all aware that the machines that need to be replaced in 2007, but there's also been equipment that we've been asked to buy EVAP testers things as such."

This comment/recommendation was rejected because:

This comment is not germane to the proposed regulation. This regulation only creates performance standards that stations and technicians will need to meet if they choose to inspect vehicles pursuant to H&S section 44010.5 and 44014.7, and vehicles identified by BAR as gross-polluting. This package does not create any additional inspection procedures or require any additional Smog Check inspection equipment.

Further, the STAR Program is a voluntary program that allows higher performing stations and technicians the privilege to test the dirtiest vehicles in the state. The program is intended to raise the performance of low-performing stations by creating an economic incentive to test vehicle selected for testing pursuant to H&S 44010.5 and 44014.7, or vehicles identified by BAR as gross polluters. In assessing the economic impact to Smog Check stations and technicians BAR thoroughly examined the industry as a whole. BAR has determined there will be a redistribution of inspection volume from lower performing stations to higher performing stations.

This regulation does not change the number of vehicles that will be subject to a Smog Check inspection. Further, BAR cannot make an individual determination regarding how the regulation will impact each station and technician and the impact it will have on their STAR score and/or inspection volume. Overall, this proposal does not create any statewide economic impact.

d. "Excessive Test Deviation Rate paragraph seven. Passing OBD II systems with the maximum number of unset readiness monitors allowed. We believe the standard needs to be refined further and possibly apply only to only *[sic]* 1996-2000 model-year vehicles which have a maximum allowable onset monitors of two. If these standards apply to 2001 and later, OBD II vehicles requiring a maximum of only one unset monitor. Vehicles which require multiple drive cycles, extended cool down time

between drive cycles and overnight rest periods for EVAP monitor testing will either require a second visit or a two day stay for a smog check. This would be necessary to protect the station from receiving a poor STAR rating. Although one failed area of standards maybe allowed in the purposed rating, an automatic failed rating standard should such as this might combine with other failures to cause two failures and a low STAR score. A possible solution is to eliminate the need for the EVAP monitor to run unless there's an actual EVAP repair necessary. But all others must or this will create a deviation flag of 2001 and later test vehicles. "

This comment/recommendation was rejected because:

This comment is substantially similar to a another comment, please reference section I., subsection 4., paragraph d.

e. **"I have a comment on Section 3340.1 definitions Follow-up Pass Rate. We believe this standard is too broad, it does not allow for normal breakdown vents. Which take place as vehicles age and components wear. Simple actions such as putting the wrong fuel in the vehicle or incorrect octane can cause emission components to degrade resulting in a failed emissions test. A possible solution is to have a deviation raised only for vehicles that fails the next emission test due to the same reason as the previous failed inspections."**

This comment/recommendation was rejected because:

This comment is substantially similar to another comment, please reference section I., subsection 4., paragraph e.

f. **"And I also have a comment on the Follow-up Pass Rate. I was always under the assumption at past workshops that the STAR Program was inspection-based standards. And so isn't the Follow-up Pass Rate grading repairs? So I am confused because this is again been mentioned that we are grading inspections. And so again the Follow-up Pass Rate is grading repairs. And it just seems like a contradiction here."**

This comment/recommendation was rejected because:

The STAR Program is intended to change the way station owners, managers, and technicians think about the Smog Check Program. At present, some Smog Check technicians deliberately help motorists with malfunctioning vehicles pass an inspection. The STAR Program works to incentivize the performing of accurate inspection; thus ensuring that high polluting vehicles are properly repaired prior to being certified and registered. The referenced language used in the quoted document and used during workshops was meant to reinforce that the point. Currently, it is a practice for some stations and

technicians to perform several tests on vehicles that failed their initial test in hopes that they might be able to over-condition the vehicles and get them to pass without performing necessary repairs. Over-conditioning occurs when a technician performs a Smog Check inspection in such a way as to get the catalytic converter hotter than it would be under normal operating conditions. In such cases, a vehicle might pass an inspection when it should fail.

The Sierra Research, Inc. report concluded that the FPR measure was an effective means of identifying the performance of stations. The report identified a high failure rate among vehicles inspected during Roadside inspections as being a major problem for the effectiveness of the Smog Check Program. It was originally thought that this high Roadside failure rate might be due to insufficient short-term repairs masking larger problems and allowing vehicles to pass when they had major repairable defects. An example of such a repair is installing a new catalytic converter on a vehicle that had a fueling system problem. Presumably, the vehicle might pass a test in the short-term in spite of the fueling problem, but the emissions would soon exceed the emissions cutpoint as the rich fuel condition overwhelmed new catalytic converter.

As it turned out, the report showed that the real problem was that the vehicles were never in a passing condition at the time of the inspection when the vehicle was certified. In other words, low-quality or incomplete repairs were insufficient and did not result in high-emitting vehicles passing their Smog Check inspections, rather stations and technicians either intentionally or carelessly passed vehicles that should have failed their inspection. As a result, vehicles that were inspected improperly influenced the high Roadside failure rate.

While performing Roadside inspections on all vehicles in order to gauge inspection accuracy would not be practical, the FPR emulates the post-certification Roadside inspection results in the same way without the additional expense. As was shown in the Sierra Research, Inc. report, stations will do well on the FPR if they perform proper inspections in accordance with the inspection equipment test prompts and Smog Check Inspection Procedures Manual. Vehicles that are certified properly will have a higher likelihood of passing the test in the next inspection cycle than vehicles that were certified improperly.

g. "I will comment on Section 3392.3.1 'Eligibility for STAR Certification' receiving a citation no matter how serious will make a smog facility ineligible for STAR Certification for at least one year. This requirement is too harsh and out of line for a smog facility that simply makes an unintentional paperwork error or a mistake. BAR should be able to distinguish and separate serious citations from unintentional paperwork citations.

This comment/recommendation was accepted as follows:

This comment is substantially similar to another comment, please refer to section I., subsection 4., paragraph f.

h. "I would like to comment on 3392.3.1 'Eligibility for STAR Certification' I have a comment about paragraph 11. It says 'required Smog facilities to have physical possession of manuals or publications.' In this electronic and computer age we believe it is not necessary. We believe the requirement should be amended to allow facilities to maintain and allowed to have electronic access to all manuals. I think that we are all on the same page that because we are in an electronic era."

This comment/recommendation was accepted as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 4., paragraph g.

i. "I would like to comment on 3392.3.1 'Eligibility for STAR Certification' I have a comment about Paragraph 11. It says 'requiring smog facilities to have physical possession of manuals or publications,' in this electronic and computer age we believe it is not necessary. We believe the requirement should be amended to allow facilities to maintain and allowed to have electronic access to all manuals. I think that we are all on the same page that needs to change because we are in an electronic era. I would like to comment on section 3392.5.1 'causes for invalidation of STAR Stations Certification.' I have a comment on paragraph three. My comment is that says invalidating a STAR station certificate for discipline by the Bureau 'in any form or matter' is too broad. This could include *Write It Up* programs or office conferences. Education training and information type situations with the BAR should not be a cause for a station to lose its STAR certification. The ASCCA recommends that phase 'any form or matter' be deleted from Paragraph three of this section. And my last comment is that you can get ahold of Jack Molodanof ASCCA's Legislative advocate if you have any questions. Thank you very much."

This comment/recommendation was accepted as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 4., paragraph h.

7. *The following comment was received during the South El Monte regulations hearing on June 13, 2011 from Jim O'Neill, Chino Auto Tech.*

   a. **"My questions also address what Craig testified to with the Excessive Test Deviation Rate. My question is since this is a test based program, not repair based program, but I wondered if these standards for unset monitors applies to after repair tests also?"**

   This comment/recommendation was rejected because:

   No. The unset readiness monitor deviation only considers unset monitors seen during the initial inspection for each vehicle during an inspection cycle. Thus, if technicians were to reset a vehicle's computer in order to gauge the effectiveness of repairs after an initial test failure, this would not affect their score for this metric.

   b. **"Just on a follow up of test deviation rate. Our grades will be upgraded quarterly by STAR and posted online and we're able to see if we have any deviations at that point. That's all I have. Thank you."**

This comment/recommendation was accepted as follows:

The commenter is correct. Scores will be updated quarterly for application purposes. Informational scores, which licensees can use to track there performance more closely, will be updated monthly.

8. *The following comment was received during the Sacramento regulations hearing on June 13, 2011 from Tracy Renee, Gene's Auto Repair.*

   a. **"The first thing I'd like to start with is section 3340.1 regarding the Follow-up Pass Rate. We have a lot of members that are concerned about this and one of the things in the definitions that are on the PDF on the Bureau's Web site for the follow up pass rate mentioned the repair and maintenance quite a few times. And with the STAR Program being presented as an inspection-based performance program only, not having anything to do with repairs. This is a concern to a lot of our members, as far as how this will affect them. Because the Follow-up Pass Rate is directly related to the maintenance and repairs of these vehicles. So that is a big issue with our group."**

   This comment/recommendation was rejected because:

   This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 6., paragraph f.

b. "'Half of these vehicles were tested improperly and certified to get the vehicles to pass without the necessary emission repairs, the other half were tested properly, failed the inspection, repaired properly and then certified properly. Vehicles from which of the two populations will pass at a lower rate in their next inspection cycle? The answer to this question is clear. Unless the improperly tested received some repairs subsequent to their last inspection, they will continue to be high polluting vehicles in their current inspection cycle. Some of the vehicles that were properly inspected, repaired and certified in the previous inspection cycle, may fail into disrepair by the time of their next inspection cycle. However, a majority of these repaired vehicles will continue to have comparatively lower emission levels when inspected in the next inspection cycle. As a result, the vehicles that were properly inspected, repaired and certified, will fail at a much lower rate in their next inspection cycle.' And it goes on and on with using the words 'repair' and 'maintenance' and things like that. And because of the fact that none of us have seen the actual scores and things like that it's troublesome just to worry about how it will honestly affect the technicians that are doing the inspections on the vehicles. So we don't have any control over consumers maintaining their vehicles or authorizing repairs to their vehicles or anything like that. So that was one of our big concerns. The other concern we have several, and I understand that Craig was in Southern California representing a lot of our concerns. So I won't repeat all of them."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 4., paragraph e.

c. "So I will move on from the Follow-up Pass Rate. The other thing is section 3340.1 Definitions Excessive Test Deviation Rate paragraph seven - passing OBD II systems with a maximum number of unset readiness monitors allowed. This is a concern to our members because if we at this point are supposed to be inspecting the vehicles in their present condition, not trying to find out if there's failures in any areas, just write up the vehicle and proceed with the testing. Then we would not know how many monitors are ready and how many monitors are not ready. There are some stations and technicians throughout the state that do dealer vehicles, you know a lot of inspections for the dealers. A lot of inspections for vehicles that are for auctions, things like that. There are lots of consumers that try to game the system by disconnecting their battery and make their check engine light disappear and then just drive it a little bit and try to sneak it through. So we have a concern of exactly how this will affect our technician grading and station grading because we have no control over that. And we're not sure if you're going to change the

inspection procedures, at all as far as what they are right now. But we have no control over what we're testing when it comes in for its initial test. So that is a concern to us."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I. subsection 4., paragraph d. and section I., subsection 5., paragraph a.

d. "I believe section 3392.3.1 Eligibility for the STAR Certification paragraph five - receiving a citation no matter how serious will make a smog facility ineligible for the STAR certification for at least one year. I believe Craig went over that and that was discussed, we just feel that's too harsh and out of line for a smog facility that simply makes an intentional *[sic]* paperwork mistake or error. So we would like that addressed."

This comment/recommendation was accepted as follows:

This comment is substantially similar to another comment, please reference section I., subsection 4., paragraph f.

e. "One of the other things that we're concerned about is the Notice of Purposed Regulatory Action on page 17, which states that there are no costs associated with becoming a STAR Certified station. We don't feel that's accurate. There are several costs involved with becoming STAR Certified, and if in fact STAR stations will be required to have the existing equipment, along with the new equipment for the OBD-only then there is a great cost associated with that. And the fear is that the tailpipe testing will diminish when this new program goes into effect. And we're not sure of the numbers of how many tailpipe tests we will be seeing being directed. So the cost of maintaining the existing equipment with service contracts, and technicians service contracts and supplies, calibration gasses, etc. are an expense. And depending on the number of tests that the station will be performing on the existing equipment will make an impact on the overall costs, and also the costs to the consumer because that equipment will be required to be a STAR Certified station. Page 17 is what I am referring to. I believe that Craig has covered other issues, I believe I am done at this time."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph p.

9. *The following comment was received from Ann Melton, Ann's Auto Masters and ASCCA Board of Directors.*

   a. **"On section 3392.3.1 Tracy meant to say it's 'unintentional' that we would make a mistake not 'intentional' that we would make a written mistake. It is unintentional, we would be doing our work orders or the report and we might make a mistake, and we don't feel we should be responsible for that mistake to be cited for. Other than that, Tracy has I think made it very clear, and Craig Johnson as well as how the ASCCA I think we do support I feel that most of the members do support this program, but we just have concerns to make sure that things are clarified in the program that will not effect us for doing business in the future. Other than that I think that everything has been said. Thank you."**

   This comment/recommendation was rejected because:

   This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 8., paragraph d.

II. First 15-Day Notice of Modified Text

1. *The following comment was received from William L. Gausewitz, on behalf of California Emissions Testing Industries Association (CETIA)*

   a. **"General Objections: The changes encompassed in the Modified Language do not address the fundamental concerns that we raised in our letter of June 14, 2011, commenting upon the initial draft of the regulations. In particular, many of the purported performance standards in the proposal do not in fact measure the performance of individual stations or technicians and, thus, violate section 11342.1 of the California Government Code[11] as they are not within the authority conferred upon BAR by statute. Also, the proposed regulations will result in significant economic disruption and loss of jobs in the smog check industry. The determinations by BAR to the contrary in the record of the rulemaking are incorrect and violate the relevant provisions of the California Administrative Procedure Act (APA)."**

   This comment/recommendation was rejected because:

   This comment is substantially similar to another CETIA comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph c. and p.

[11] Unless specified otherwise, all subsequent section citations are to the California Government Code.

b. "Excessive Test Deviation Rate (ETDR): The continued use of the statewide average means that, by definition, on half of all stations will fail to meet this metric. This is an arbitrary standard which is unsupported by any rationale and, therefore, violates the necessity standard of section 11349(a)."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph m.

AB 2289 was introduced and adopted to provide statutory authority for several improvements to the Smog Check Program. This regulatory action deals solely with the inspection-based performance standards of AB 2289. These standards have been developed based, in part, on the current Gold Shield Program, which requires Test-and-Repair stations to meet similar standards to the ones proposed in this regulatory action. Further, the Sierra Research, Inc. report, "Evaluation of the California Smog Check Program Using Random Roadside Data," recommended that BAR refine the performance algorithm currently used in the Gold Shield Program to improve the performance of stations and technicians. Since the ETDR tracks how each station performs Smog Check inspections, this standard clearly meets the necessity standard and helps BAR implement a program mandated by statute.

AB 2289 is silent with respect to the number or percentage of stations that must meet the inspection-based performance standards. Presumably, the authors intended there be an adequate number of stations meeting the inspection-based performance standards to handle the directed vehicle provisions of Health and Safety Code section 44010.5. Even if only half of the stations qualify for the new performance standard, that would not indicate that the proposed action failed to satisfy the necessity standard.

That being said, the commenter has a fundamental misunderstanding of how the individual performance measures within the ETDR work. As explained in the proposed regulation and at over 20 statewide workshops conducted by BAR over a two-year period, this proposed regulatory action defines the Excessive Test Deviation Rate for four required components of a Smog Check inspection. These include the failure to perform, when required for a vehicle, the ignition timing test, fuel cap test, low-pressure fuel evaporative test, and OBD II test. In each case, an excessive test deviation is set if the station's rate exceeds the statewide average for similar vehicles where 90% of the similar vehicles received the test. Stations that are careless or intentionally bypass a component of the inspection will be the ones identified with deviations. Most stations will not receive a single deviation; far fewer will have an Excessive

Test Deviation Rate. For the remaining three ETDR categories, BAR is examining three specific station behaviors – the frequency of restarting tests, aborting tests, and passing vehicles with the maximum number of allowable OBD readiness monitors -- affecting the accuracy of the Smog Check inspection. The standard for these criteria is set at 125% of average, thus average behavior is not excluded.

c. "This proposed regulation violates the clarity standard of section 11349(c). To begin with it invokes the definition of 'similar vehicles' which is impermissibly vague. This definition provides that 'vehicles with similar model-year, make, model, engine displacement, transmission type *or* body type' (emphasis added) are considered to be similar vehicles. The use of the disjunctive 'or' means that any single one of these characteristics shared between two vehicles makes them 'similar vehicles'. Taken literally, this definition means that a 2002 Ford F350 pickup truck and a 2002 Honda Civic are 'similar vehicles' under the regulation since they have a 'similar model year.' By employing this definition of 'similar vehicles' in the definition of the ETDR the regulations make it impossible for a person subject to these regulations to determine whether or not any particular vehicle is going to be subject to measurement in the ETDR and thus make it impossible for that person to know whether or not any specific vehicle test will be measured by the ETDR and, if so, against which other vehicles that test will be applied."

This comment/recommendation was accepted as follows:

The definition of "similar vehicles" has been modified to improve its specificity and address concerns that BAR's definition of similar vehicle was overly broad and could be used to compare vehicles that were not in fact similar in nature. Most "similar vehicles" will be determined based on the VLT Row ID; this means the vehicle has the same model-year, make, model, engine displacement, transmission type, and body type. However, in cases of limited production vehicles, BAR must determine similar vehicles by the model-year, make, and engine displacement. This alternative meaning of "similar vehicle" is to ensure BAR does not exclude a significant portion of California's vehicle population from use in determining a station and technicians ETDR, FPR, and SVFR. That being said, persons subject to this regulation will not necessarily know when a vehicle they are inspecting will be considered in determining a particular measurement within the Excessive Test Deviation Rate since these measures are constantly changing based on how the industry as a whole performs inspections.

Additionally, stations and technicians are currently required to perform inspections in accordance with the Smog Check Inspection Procedures Manual, incorporated by reference in regulation, and by following the inspection prompts of the required test equipment. If these steps are followed,

the technician will be able to properly inspect the vehicle; the only vehicles that will not be considered in the ETDR are vehicles that do not have a large enough sample size to make the data statistically valid. Inspections should, but are often not performed properly, thus creating the necessity for this proposed regulatory action.

As modified during the second 15-day notice the definition for "similar vehicles" reads as follows:

> *"'Similar vehicles' means vehicles with the same Vehicle Lookup Table Row ID, or at a minimum, vehicles with the same model-year, make, and engine displacement."*

d. "The revised definition of ETDR is an arbitrary and ambiguous statistical measurement which does not measure the performance of any individual station or technician. Every statistical measurement includes a margin of error – a probability of true results falling outside the range that they attempt to define. This imprecision in statistical measurement means that there are certain to be cases in which stations and technicians perform their testing correctly but fail to meet the statistical metrics only because they fall within the statistical margin of error. Thus the revised ETDR, since it purely a statistical measurement, does not actually measure the performance of any individual station or technician. The EDTR thus cannot be considered to be an 'inspection based performance standard' as required by AB 2289 (Eng, 2010). The revised definition of the ETDR thus violates the APA authority, reference, and clarity standards, as well as violating section 11342.1."

This comment/recommendation was rejected because:

The inspection-based performance standards are not statistical measures of performance; rather they are based on observed behavior (e.g., Smog Check inspections). The only statistical measure employed by BAR is for the purpose of determining a qualifying standard, which is similar to an examination for licensure where an individual must meet a minimum competency level or score. As such, the EDTR cannot be construed as "arbitrary and ambiguous," or a violation of the clarity standard due to its reliance on fact.

The authority, reference and necessity standards and Government Code section 11342.1 have been fully satisfied since AB 2289 requires BAR to establish inspection-based performance standards pursuant to H&S sections 44014.2 and 44014.5. While application of the standards were provided in AB 2289, the specifics as to how the performance standards were to be developed were not. As a result, BAR relied on the precedent established by

the Gold Shield Program, which will be replaced by the STAR Program using similar standards to determine station performance.

e. **"Follow-up Pass Rate (FPR): As with the ETDR, the FPR is a statistical metric which provides stations and technicians with no guidance regarding how to conduct its testing. It merely measures the rate at which tested vehicles fail the subsequent test which occurs two years later. There are a host of variables that may cause a vehicle to fail a follow-up test even though the original test was performed perfectly. Most of these variables are outside of the control of the testing station or technician. These include how the vehicle was maintained, whether there was an ownership change, whether an economic downturn which resulted in deferred maintenance or the use of too low a grade of fuel, vehicle modification or customization, or whether the vehicle switched between personal and commercial use, and the quality of the follow-up test. A vehicle may pass a test which was conducted perfectly and, due to these or other factors, fail its follow-up test two years later.**

This proposed regulation, therefore, provides stations and technicians with no guidance as to how to conduct testing in order to satisfy its requirements. The regulation therefore violates the clarity standard of section 11349(c). Since the FPR holds a station or technician responsible, in effect, for the results of tests which occur two years after that station or technician did the initial test, it cannot be said to be a measurement of the actual performance of the testing by the station or technician. The initial test may have been perfect and the follow-up test defective, but the violation is imputed to the earlier perfect test. The rule thus cannot be considered to be 'inspection based performance standards' as required by AB 2289 and violates the APA authority, reference, and clarity standards, as well as violating section 11342.1. The rulemaking record does not contain substantial evidence that the FPR actually measures performance and it therefore violates the APA necessity standard.

Once a test is performed it is complete. There is nothing that can be done to alter a completed test. When the FPR is employed, the quality of a completed test is not based upon the specific facts of the test, but on how the vehicle performs on a subsequent test. Failure on a subsequent test may mean that the original test was faulty, or it may mean that the vehicle has changed in the two years following the original test so that it no longer complies with the law, or it may mean that the follow-up test was faulty. Since it is impossible to say what is measured in the FPR, it is impossible legitimately to call it a performance standard. Use of this standard, as previously stated, exceeds the authority granted to BAR by statute – authority which is limited to the adoption of performance standards."

This comment/recommendation was rejected because:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph c. and the response below.

Sierra Research, Inc. report, "Evaluation of the California Smog Check Program Using Random Roadside Data," showed that vehicles having initially failed and then subsequently passing an inspection at a Smog Check station, roughly half the group of 1976-95 model-year vehicles were again failing at Roadside inspections conducted by BAR within 6 months. Further, analysis in the same report showed that the vast majority of those vehicles were in a failing condition at the time they were certified; poor inspection performance allowed vehicles that should have failed an inspection, to pass. The report also showed similar results for vehicles that passed their previous inspection at a Smog Check station. Poor inspection quality allowed many vehicles to be certified when they should have failed.

The FPR was specifically designed by BAR to accurately measure post-certification pass rates without having to rely on the more labor intensive BAR Roadside inspection data. The Sierra Research, Inc. report also examined effectiveness of the FPR metric, specifically related to a station performance program.

Stations with high FPR scores had dramatically higher post-certification pass rates when the vehicles they certified were later measured at BAR Roadside inspections. In other words, stations that received higher scores in the Sierra Research, Inc. study performed more accurate Smog Check inspections in the previous inspection cycle. Conversely, stations that received lower scores performed less accurate Smog Check inspections in the previous inspection cycle. The FPR is an excellent indicator of inspection performance for vehicles certified by Smog Check stations as being in compliance with emissions standards, thus meets the APA necessity standard.

The commenter believes that BAR has failed to meet the clarity standard of the APA because it has not provided "guidance" to stations and technicians regarding how to conduct a test. However, BAR's Smog Check Inspection Procedures Manual requires inspections to be performed unless certain exceptions, listed in the Manual, apply. The technician ultimately interprets each vehicle situation to determine whether or not an exception may apply. Even if an exhaustive list of test procedures was possible to develop for each and every vehicle, the list could never contain every unique circumstance which may justify bypassing certain components of a test. In essence, publishing this list is not feasible or practical.

The commenter raises the concern that a number of different factors can lead a vehicle to pass or fail its next inspection regardless of the quality of inspection last performed on the vehicle. When considering large quantities of Smog Check inspection results, statistical anomalies such as those mentioned by the commenter subside, thus creating testing techniques resulting from the quality of the inspections performed at each station and by each technician.

The proposed performance standards do not violate the APA authority, clarity, and necessity standard or Government Code section 11342.1 because the compliance requirement mandated by AB 2289 is clear: perform proper inspections in accordance with prescribed test procedures set forth in BAR laws and regulations.

f. "The revised FPR is particularly inapplicable to performance by a station. In any individual test the actual control and degree of performance of the test performed rests solely in the hands of the technician. By applying the FPR to stations the statistic loses any semblance of validity. A station in which every technician performs mediocre work may obtain a FPR score that is marginal but adequate. A station that temporarily employs a single unethical or incompetent technician who is subsequently terminated may receive an inadequate FPR. If a station has terminated an unethical or incompetent agent it serves no purpose to punish the station when vehicles originally tested by this technician are retested two years later. Particularly when applied to stations, therefore, the FPR violates the above-specified requirements of the APA.

Application of the FPR to stations is a particularly severe example of regulatory overreach. It could well result in a single unethical or incompetent technician causing an entire station to lose its certification with the resulting loss of work causing serious economic harm both to the owner of the shop and to the other technicians, even though they may have otherwise perfect FPR scores."

This comment/recommendation was rejected because:

Since licensed Smog Check station owners employ technicians to act on their behalf station owners are legally responsible for their employees' actions. As such, a station's FPR score is directly tied to the Smog Check inspection performance of the technicians employed at that station. Station owners must provide sufficient oversight to ensure that the technicians employed at their shops are performing proper inspections.

Still, the primary focus of the FPR is on the technician, not the station. A station can have the lowest FPR score possible (zero) and still be allowed to participate in the STAR Program, provided that the station has Smog Check

technicians with passing FPR scores (0.4 and higher). This means that a station that received a low FPR score due to "a single unethical or incompetent technician who is subsequently terminated" can continue to participate in the STAR Program. This concession was developed based on comments received at public workshops conducted by BAR with the Smog Check industry.

g. "Certification and Invalidation Requirements: The Modified Language includes two sections, § 3392.3.1(a)(5) and § 3392.5.1(a)(1), which list provisions of law and regulation which can form the basis for failure to obtain STAR certification or invalidation of STAR certification. These two lists are identical and the following comments apply to both of these proposed sections of the Modified Language.

Each of these sections is made applicable when a station or technician is issued a citation for violation of the listed sections. A citation is an initial allegation of a violation. It is not a final determination that a violation occurred. Under the proposed regulations, however, the simple issuance of a citation would be a definitive basis for denial or invalidation of STAR certification. Even if the citation was ultimately determined to be erroneous, the mere fact that it was issued would be adequate to support denial or invalidation of STAR certification. Basing a final determination of eligibility for STAR certification on a citation alone exceeds the authority of BAR under governing statutes in violation of section 11342.1."

This comment/recommendation was accepted, in part, as follows:

BAR modified sections 3392.3.1(a)(5) and 3392.5.1(a)(1) to ensure that only violations relating to Smog Check inspections will be used to determine eligibility for the STAR Program. (Emphasis added.) This change is consistent with AB 2289 in allowing for inspection-based performance standards.

In regards to citations, BAR has always intended to use the effective date of a citation as the basis for determining eligibility for the STAR Program. However, to avoid any confusion, only "final and non-appealable" citations will be used in determining STAR eligibility. This revision provides persons directly affected by this proposal additional specificity as to when a citation will be used in determining STAR eligibility.

Section 3392.3.1 (a)(5) has been modified during the second 15-day notice to read as follows:

"A station cannot have received a citation which is final and non-appealable, nor can a station employ any licensed Smog Check technician

who has received a citation which is final and non-appealable, within the preceding one-year period from the effective date of the citation for violations of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032, and 44060 of the Health and Safety Code; and sections 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."

Section 3392.5.1 (a)(1) has been modified during the second 15-day notice to read as follows:

"The STAR station, manager, or any licensed technician employed by the station is issued receives an order of suspension, probationary order, or a citation, that is final and non-appealable for violations of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032, and 44060 of the Health and Safety Code; and sections 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."

h. "The rulemaking record contains no substantial evidence regarding the necessity for adoption of these sections and, therefore, the sections violate the necessity standard of § 11349(a) and of Title 1, Cal. Code Regs. § 10."

This comment/recommendation was rejected because:

The proposed STAR Program is designed to improve the performance of Smog Check stations through the use of incentives. Stations meeting performance standards will be eligible to test vehicles pursuant to H&S sections 44010.5 and 44014.7. The basis and rational for the development of AB 2289 are the recommendations identified in the Sierra Research, Inc. report. This report specifically recommends BAR refine its current station performance algorithm.

"To better address the extent to which improper and/or falsified test results may be factors in the Smog Check Program, the following additional steps should be considered [by the Bureau]:

1. *Further refine the Station Performance Algorithm [Follow-up Pass Rate] and use it to target low-performing stations for increased enforcement and to create incentives for more stations to become high performing…"*

As indicated in the Initial Statement of Reason, BAR relied on AB 2289 and the Sierra Research, Inc. report, among others, in developing the proposed

regulation. These are compelling reasons and they establish the necessity for the proposed regulatory action.

i. **"In addition to failure to satisfy the necessity standard, the following specific statute and regulation sections otherwise violate the APA when included in the proposed sections, § 3392.3.1(a)(5) and § 3392.5.1(a)(1).**

• Health & Safety Code § 44015 – The listing of this section means that a station or technician could be denied STAR certification for paperwork or legal violations which have no relationship at all to the performance of emissions testing. Thus the inclusion of this section creates a STAR certification standard that is not an inspection-based performance standard as required by AB 2289. Inclusion of this provision therefore violates the authority and reference standards of section 11349 and violates the authority limitation of section11342.1.

• Health & Safety Code § 44060 – This statute does not relate to emissions testing in any way. The inclusion of this section in the Modified Language therefore creates a STAR certification standard that is not an inspection-based performance standard as required by AB 2289. Inclusion of this provision therefore violates the authority and reference standards of section 11349 and violates the authority limitation of section11342.1.

• Title 16, Cal Code Regs §§ 3340.15, 3340.16, and 3340.16.5 – These sections establish general requirements for smog check stations. They have no specific relation to the performance of emissions testing. The inclusion of these sections in the Modified Language therefore creates STAR certification standards which are not inspection based performance standards as required by AB 2289. Inclusion of these provisions violates the authority and reference standards of section 11349 and violates the authority limitation of section11342.1.

• Title 16, Cal Code Regs § 3340.45 – Inclusion of this section means that STAR certification could be denied based upon failure to comply with the inspection requirements and procedures prescribed in the Bureau's Smog Check Inspection Procedures Manual. The Procedures Manual contains many provisions that are not related to emissions testing. To the degree that the regulation allows BAR to deny or revoke STAR certification based upon failure to comply with requirements in the Procedures Manual unrelated to emissions testing. It is establishing standards which are not inspection based performance standards. Inclusion of these provisions violates the authority and reference standards of section 11349 and violates the authority limitation of section11342.1."

This comment/recommendation was accepted, in part, as follows:

After reviewing H&S sections 3392.3.1(a)(5) and 3392.5.1(a)(1), BAR determined it necessary to further describe which citations can be categorized as inspection-based reasons for the purpose of determining eligibility for the STAR Program. In some cases, sections of the statute and regulation include multiple subsections, some of which do not relate to inspection-based standards. As such, BAR has removed all subsections that do not pertain to Smog Check inspections. These changes are in alignment with the provisions of AB 2289, which mandated BAR to develop inspection-based performance standards.

California Code of Regulations CCR section 3340.45 inherently limits the application of the Smog Check Inspection Procedures Manual to "performing any test in accordance with the inspection requirements and procedures." Since this language is focused on inspections only, it is entirely appropriate to use section 3340.45 in determining eligibility for the STAR Program.

> *"All vehicle emission tests, visual inspections of the emissions control systems, functional inspections of the emissions control systems, liquid fuel leak inspections, and visible smoke tests shall be conducted at licensed Smog Check stations by licensed Smog Check technicians. The inspections shall be performed in accordance with the Emission Inspections System test prompts and the inspection requirements and procedures described in the Bureau's Smog Check Inspection Procedures Manual, dated August 2009."*

As amended during the second 15-day notice of modified text, section 3392.3.1 (a)(1) reads as follows:

> *"A station cannot have received a citation which is final and non-appealable, nor can a station employ any licensed Smog Check technician who has received a citation which is final and non-appealable, within the preceding one-year period from the effective date of the citation for violations of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032, and 44060 of the Health and Safety Code; and sections 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."*

As amended during the second 15-day notice of modified text, section 3392.5.1 (a)(5) reads as follows:

> *"The STAR station, manager, or any licensed technician employed by the station is issued receives an order of suspension, probationary order, or a citation, that is final and non-appealable for violations of any of the following sections: 44012, 44015 (a) and (b), 44015.5, 44016, and 44032,*

and 44060 of the Health and Safety Code; and sections 3340.15 (a), 3340.16 (a) and (b), 3340.16.5 (a) and (b), 3340.17, 3340.30 (a), 3340.35, 3340.41 (b), 3340.41 (c), 3340.42, 3340.42.2, and 3340.45 of Division 33, Title 16, California Code of Regulations."

j. "Conclusion: We encourage BAR to continue efforts to implement the statutory changes enacted last year in a manner consistent with the intent of the bill, with the requirements of the APA and in a way that will not cause any unnecessary economic disruption or loss of jobs. Thank you for your consideration of these comments."

This comment/recommendation rejected as follows:

BAR appreciates the feedback and interest of the commenter regarding the implementation of regulations consistent with the intent of AB 2289, which was to develop and apply Smog Check inspection-based performance standards fairly and evenly to both Test-Only and Test-and-Repair stations. This proposal is designed to improve the overall performance of the Smog Check Program and in turn improve economic opportunities available to Smog Check stations and technicians..

2. The following comment was received from John Devin, Smog Station Owners.

a. "Technicians who lose their STAR certification will likely lose their jobs and earning power. Test-only stations that lose their STAR certification will likely lose their businesses (because STAR = directed vehicles). Currently, on average, ~~45~~ <u>40</u> percent of test-only station revenue consists of directed vehicles."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 3., paragraph a.

b. "Citations: The Bureau can randomly and arbitrarily run an undercover vehicle with any type of anomaly to any STAR qualified station. If the anomaly is not noticed it <u>can</u> result in a 12 month STAR ban on the high-performing station and technician."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 3., paragraph b.

c. "Civil judgments: Anyone can file a ~~small claims~~ court case against any STAR qualified station for virtually any reason (related to their duties as an ARD), and if any part of the complaint is upheld by the court, no matter how small or insignificant, it can result in a 36 month STAR ban on the high-performing station."

This comment/recommendation rejected as follows:

AB 2289 requires the use of inspection-based performance standards for STAR eligibility. As such, in determining eligibility, BAR will only consider conviction of crimes or civil judgments that are inspection-based.

It should be noted that civil judgments are typically pursued only if a pattern of behavior impacting groups of consumers is established and/or in cases of high monetary value.

d. "Administrative actions: Admin court cases will be adversely affected because STAR certified stations and technicians will not be likely to agree to any stipulated settlement or probation since doing so ~~would~~ could result in a 36 month STAR ban. Virtually every case will likely go all the way through to hearing and appeal."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph q.

e. "There is also a legal issue which prohibits any use of 'Enforcement History', (citations, civil Judgments, administrative actions), for the purposes of qualifying, certifying, or invalidating high-performing STAR stations or technicians. 'Enforcement History' does not actually measure the smog check inspection performance of stations or technicians. As such, it cannot be considered to be part of an 'inspection based performance standard' as required by AB 2289 (Eng, 2010), and therefore violates the APA authority, reference, and clarity standards, as well as violating section 11342.1 of the California Government Code."

This comment/recommendation rejected as follows:

AB 2289 provided BAR broad authority to develop inspection-based performance standards. Therefore, it is appropriate for BAR to use a licensees' "enforcement history" relating to inspection-based violations of the Health and Safety Code and corresponding regulations in determining STAR eligibility.

f. "FPR does not directly measure the smog check inspection performance of stations or technicians. Instead FPR makes the assumption that by comparing the pass/fail rate of vehicles tested in the previous inspection cycle (usually 2 years ago), with the pass/fail rate of 'similar vehicles' tested now, some element of that comparison in some way measures the smog check performance of stations and technicians. This assumption ignores a large number of pervasive reactant factors, but even if we are willing to assume that FPR is to some degree accurate, the fact that it could, by definition, only indirectly measure the performance of stations and technicians as of two years ago, makes it unsuitable for use."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 3., paragraph g.

g. "There is also a legal issue which prohibits any use of FPR for the purposes of qualifying, certifying, or invalidating high-performing STAR stations or technicians. Because of its assumptive nature, FPR does not actually or directly measure the smog check inspection performance of stations or technicians. Nor does it assume the smog check performance of stations and technicians now, but only assumes that performance as of two years ago. As such, it cannot be considered to be part of an 'inspection based performance standard' as required by AB 2289 (Eng, 2010), and therefore violates the APA authority, reference, and clarity standards, as well as violating section 11342.1 of the California Government Code."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 3., paragraph g.

III. Second 15-Day Notice of Modified Text

1. *The following comment was received from William L. Gausewitz, on behalf of California Emissions Testing Industries Association (CETIA)*

a. "Definition of 'Similar Vehicles': The modified regulation proposes to amend the definition of 'similar vehicles' to read as follows:

'Similar vehicles' means vehicles with the same Vehicle Lookup Table Row ID, or at a minimum, vehicles with the same model-year, make, and engine displacement.

This proposed definition violates the clarity standard[12] of the California Administrative Procedure Act (APA)[13]. The phrase 'at a minimum' is ambiguous in this context. For example, if a vehicle has been modified by the owner by replacing the factory engine with an engine with a different displacement, it may be a vehicle with 'the same Vehicle Lookup Table Row ID' as another vehicle with a factory engine that has a different engine displacement. Since these two vehicles have 'the same Vehicle Lookup Table Row ID' they are, by the terms of the definition, similar vehicles. However, since they do not have the same engine displacement, they do not satisfy the 'minimum' standard for being similar vehicles. This rule, therefore, is not readily understandable by persons directly affected and, thus, it violates the APA clarity standard."

This comment/recommendation was rejected because:

Based upon the example provided, the phrase "at a minimum" is not ambiguous because the two vehicles could not be identified as the same Vehicle Lookup Table (VLT) Row ID.

The VLT Row ID is determined at the time of inspection, based upon entries made by the technician performing the inspection. Consider two identical vehicles, both 1985 Chevrolet Caprices originally equipped with a 5-liter engine. One of the two vehicles still has the original engine. The owner of the other replaced the original engine with a 5.7-liter engine. When the technician enters the vehicle information on the first vehicle, he or she would identify that the vehicle had a 5-liter engine, thus the inspection equipment would identify the vehicle with the VLT Row ID appropriate for a 1985 Chevrolet Caprice with a 5-liter engine. For the other vehicle the technician would enter a 5.7-liter engine, thus the inspection equipment would identify the vehicles with the VLT Row ID appropriate for a 1985 Chevrolet Caprice with a 5.7-liter engine, not a 5.0-liter engine. Even though these vehicles are the same make and model-year, they do not have the same engine displacement. Therefore, BAR could not consider them similar vehicles.

The clarity standard is met because most "similar vehicles" will be determined based on the VLT Row ID; this means the vehicle has the same model-year, make, model, engine displacement, transmission type, and body type. However, in cases of limited production vehicles, BAR must determine similar vehicles as having the same model-year, make, and engine displacement. This alternative meaning of "similar vehicle" is to ensure BAR does not exclude a significant portion of California's vehicle population from use in determining station and technician FPR scores. The phrase "at a minimum" ensures BAR identifies the best match for similar vehicles. For

[12] California Government Code § 11349(c) and Title 1, Cal. Code Regs., § 16.
[13] California Government Code §§ 11340-11365.

instance, if feasible, BAR would use a vehicle transmission type and body type to further refine the vehicle similarity.

b. "Section 3392.3.1 and Section 3392.5.1: CETIA supports the proposed changes to these sections. They are improvements. The proposed changes, however, do not eliminate the concerns that we raised in our letter of July 8. We continue to object to the possibility that a failure to comply with procedures in the Bureau's Smog Check Inspection Procedures Manual which are not inspection related may serve as the basis for decertification."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the first 15-day comment period. Please see BAR's response in section II., subsection 1., paragraph i.

c. "Furthermore, we believe that the regulation should distinguish between those violations which can only result from the inspection-related acts or failures of technicians and those violations which may result from acts or failures by the shop itself or its management. Under the present version of the regulations a shop may lose STAR certification for a violation by a technician even if the shop had no way of preventing the technician's violation and it immediately fired the technician as a result of the violation. This is unwise. By creating the possibility that a shop will lose certification based upon a technician's violation, the regulation creates an incentive for shops to hide violations by technicians rather than to acknowledge and correct them. It is also unjust as it could punish a shop for violations by a technician even if the shop was not responsible for that violation and took all reasonable steps to remedy the violation."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the first 15-day comment period. Please see BAR's response in section II., subsection 1., paragraph f.

2. The following comment was received from John Devin, Smog Station Owners

a. "Citations: The Bureau can randomly and arbitrarily run an undercover vehicle with any type of anomaly to any STAR qualified station. If the anomaly is not noticed it can result in a 12 month STAR ban on the high-performing station and technician. Out of necessity, this will cause virtually every STAR certified station and technician to take each and every citation all the way through to hearing and appeal, further clogging the Admin courts. Also, it will likely become an obligatory necessity for

the Bureau to regularly disclose and publish stats and analysis on their undercover vehicle program, e.g., quantities of vehicles, quantities of undercover runs, which stations, tabulated results, etc., to prove that any 12 month STAR ban is caused by a fair and equitable auditing system, rather than a (perceived) arbitrary, biased, or discriminatory system."

This comment/recommendation rejected as follows:

This comment is substantially similar to another comment received during the 45-day comment period. Please see BAR's response in section I., subsection 1., paragraph q.